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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The petitioner Detroit Edison Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 10, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 560 F.2d 722, and appears in the Appendix hereto at pp. 1a-12a. The Court's denial on November 22, 1977, of the petitioner's motion for rehearing appears in the Appendix hereto at p. 13a. The decision and order of

the National Labor Relations Board, enforced by the Court of Appeals, is reported at 218 NLRB No. 147 (1975), and appears in the Appendix hereto at pp. 14a-17a. The decision of the Administrative Law Judge in this case appears in the Appendix hereto at pp. 18a-59a. The original opinion and award of the arbitrator in the related arbitration proceeding dated December 3, 1973, appears in the Appendix hereto at pp. 60a-76a, and the supplemental opinion and award of the arbitrator in that proceeding dated October 22, 1974, appear in the Appendix hereto at pp. 77a-87a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 10, 1977. A timely petition for rehearing en banc was denied on November 22, 1977, and this petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is being invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 8(a)(5) of the National Labor Relations Act requires employers to furnish unions representing their employees with copies of tests and test results used by employers in the selection of candidates for jobs requiring the aptitude to learn specific skills in circumstances where the employer gave or offered to give the Union sufficient information to determine the validity of the tests, and the arbitrator involved in the grievance giving rise to this case, in construing the applicable collective bargaining agreement, found that production of the actual test battery was irrelevant to the arbitration proceeding and award.

2. Whether the judicial interpretation of Section 8(a)(5) of the National Labor Relations Act requiring employers to furnish unions representing their employees with tests and test scores conflicts with Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(h)) and the guidelines of the Equal Employment Opportunity Commission on testing (29 C.F.R. Part 1607), which require, *inter alia,* that such tests and test scores not be divulged to unauthorized persons.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> "Section 158(a) It shall be an unfair labor practice for an employer—
>
> * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

United States Code, Title 42:

> "Section 2000e-2(h) . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action on the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The EEOC Guidelines on Employee Testing are found at 29 C.F.R. Part 1607, and are reproduced in the Appendix at pp. 88a-100a.

STATEMENT OF THE CASE

This case involves an order of the Board, enforced by the Court of Appeals, requiring the Company to disclose to a Union, representing certain of its employees, tests used by the Company as a selection device for candidates to a critically important job known as the Instrument Man job in the Company's power plants, as well as copies of all test scores linked with the name of the person taking the test, and all test papers of those taking the test. The importance of the Instrument Man job lies in the fact that he is directly involved in the maintenance of power plant instrumentation, which is vital to the safe operation of the Company's various power plants in the State of Michigan (App., p. 20a).

The tests are not a measure of already acquired job knowledge, but rather measure aptitude to learn and perform the specific skills of the Instrument Man job.[1] The record disclosed that the tests have been found to be statistically and practically valid in two different validation studies (i.e., there is a high correlation between one's performance on the test battery and one's performance on the job, as measured by 23 objective tasks on the job—tasks which are representative of the content and complexity of the job). One of these studies was performed in 1969-1970 by the Company's own professional psychologist staff and a later one was performed in 1972 by an outside professional consulting firm known as the National Compliance Company.

[1] The tests involved were the Minnesota Paper Form Board Test, which has been in use for several years to predict the ability to visualize in three dimensional space, and the Engineering and Physical Science Aptitude Test, which is divided into six parts, measuring an applicant's aptitude for mathematics, formulation, physical science comprehension, arithmetic reasoning, verbal comprehension and mechanical comprehension.

The case arose in the context of a Union grievance and subsequent arbitration proceeding in which the Union challenged the Company's selection of certain employees to the Instrument Man job. The grievants were denied the job because they had failed to make an acceptable score on the test. In the course of the arbitration proceeding and subsequent NLRB case the Union demanded copies of the test battery administered, the test scores and test sheets of all the applicants for the job. The Company responded by furnishing the Union with sample questions, a written explanation of the tests, the written validation studies of the tests, and each applicant's raw score without linking the applicant's name to the score. The Company also offered to furnish the Union with the test score of any applicant who was willing to have his score divulged and to turn over the test battery to a qualified professional psychologist of the Union's choice.

In the arbitration case the arbitrator found that the Union's position in that case was not damaged in any way by its lack of access to the test battery (App., p. 72a). He also found that the test battery was a "reliable valid test . . ." (App., p. 72a). On the merits he upheld the Company's right under the collective bargaining agreement to require an acceptable score on the tests, but required the Company to re-examine the qualifications of certain applicants whose scores on the test fell slightly short of the minimum acceptable score. In a supplemental award the arbitrator

found that the Company's re-examination, pursuant to his earlier award, had been properly carried out (App., p. 87a).

The Union, however, continued to demand copies of the actual test battery used, the test scores linked with the names of the applicants and the test sheets of all applicants, and initiated the unfair labor practice charge with the NLRB that gave rise to this case.

The Administrative Law Judge ordered that the battery of tests not be disclosed to the Union directly, but rather to a qualified psychologist of the Union's choice who would be free to consult with the Union and show the Union the tests to the extent necessary to process a Union grievance over promotion to the Instrument Man classification, but not to permit the Union to copy the test or otherwise disclose the test to those who may have taken the test in the past or might take it in the future. Inasmuch as the Company at the outset of the unfair labor practice hearing had offered to show the battery of tests to a qualified psychologist of the Union's choice, the Company did not except to that portion of the decision of the Administrative Law Judge, but did except to his proposed order that the raw test scores and actual test papers of applicants be turned over directly to the Union. The Union excepted to the requirement that the test battery be disclosed to a qualified psychologist of the Union's choice rather than to the Union directly.

The Board in a two to one decision upheld the Union exception and ordered that all the test materials involved be disclosed to the Union directly. The Board concluded that:

> "While we are making the tests available directly to the Union, we shall, in order to preserve their future utility, impose the same restrictions upon their use by the Union as recommended by the Administrative Law Judge." (App. p. 16a)

Former Member Kennedy would have affirmed the decision of the Administrative Law Judge in its entirety, noting that:

> "There is no professional obligation on the part of the Union not to publicize the tests or their results. I do not see how the Board can enforce its exhortation not to copy or disclose the tests." (App., p. 17a).

The majority decision of the panel of the Court of Appeals enforced the Board's order in all respects.

In answer to the Company's concern about dissemination of the tests by turning them over to the Union directly, the majority merely referred to the provision in the Board decision quoted above purporting to impose a restriction on the dissemination of the test materials. In answer to the Company's concern that turning raw test scores, linked with the names of the persons taking the tests, and actual test papers of the applicants directly to the Union would involve a breach of a pledge given to each of the persons taking the tests that the results of the test would not be disseminated, and subject such persons to needless embarassment, humiliation and harassment, the majority of the Court simply cited its decision in *General Electric Co.* v. *NLRB,* 466 F.2d 1177 (6th Cir. 1972), holding that wage information received by the Company from other companies on a confidential basis and used as a part of a wage survey to determine rates of

pay for employees of the Company must be disclosed to the Union.

Finally, in answer to the concern of both the Company and the American Psychological Association (herein referred to as APA) as *amicus curiae* that disclosure directly to the Union of the test materials would involve the Company psychologists in a violation of their professional ethical code, the majority of the Court simply found that "the principles which underlie the National Labor Relations Act are paramount in this case" (App., p. 8a).

Circuit Judge Weick filed a dissenting opinion in which he concluded that the Board had not followed the standard used in *Kroger Co.* v. *NLRB,* 399 F.2d 455 (6th Cir. 1968), of recognizing and adequately protecting each of the conflicting interests involved. He found that the Board order recognized only the interest of the Union and that its order "constituted a gross abuse of discretion" (App., p. 12a).

Judge Weick pointed out the several Company efforts to accommodate the Union's interest in the Company's testing program and concluded that such information was "sufficient to permit the union to process adequately the grievance before the Arbitrator, or to perform its duties under the collective bargaining agreement" (App., p. 11a). To the majority opinion's claim that dissemination of the testing materials was adequately protected by the Board's Order, Judge Weick found such reasoning to be "really naive" and quoted, with approval, former Member Kennedy's analysis in support of this conclusion (App., p. 11a).

In addition, Judge Weick found that disclosure of the testing materials would involve the Company psychologists in a violation of the Code of Ethics of the APA, which has been recognized by the statutes of the State of Michigan, and that disclosure of the test scores and test papers linked to the name of the person taking the test constituted an invasion of a confidential and privileged relationship between the psychologists and the examinees.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Raises Significant and Recurring Problems Concerning the Ability of Employers to Continue to Use Testing as an Employee Selection Device

Testing is a major employee selection technique in both American industry and in government itself. A September, 1976, survey by the Personnel Policies Forum of the Bureau of National Affairs found from surveying 196 companies representative in size, geographical location, and nature of operation of American business generally, that 42% of such companies use job related tests in selecting employees for non-management jobs. PPF Survey No. 114, p. 1 (BNA, Sept. 1976). A December, 1977, survey by the U.S. Civil Service Commission found that that Commission alone uses 63 different tests in selecting federal employees, with 515 alternate forms of such tests, and that in fiscal 1977 alone, 891,635 persons were administered such tests, of whom 84,473 persons were selected for positions. Status of Test Usage in FY 77, Technical Note 77-2, Test Services Section, Personnel Research and Development Center, United States Civil

Service Commission (Dec. 1977). The decision below, if not reviewed and reversed by this Court, will pose significant, if not insuperable, barriers to the continuation of these extensive testing programs.

The primary barrier posed is that a requirement to turn over the test battery to unions representing employees will naturally lead to foreknowledge of the actual test items by all or a part of the employees who are to take the tests in the future. This foreknowledge, in turn, invalidates the results of the test from both a practical and a legal point of view.

As a practical matter, it is evident that such foreknowledge will result in a situation where the high scorers on the test will reflect not the aptitude of the taker of the test to perform the job, but rather the extent of his familiarity with the items on the test and his ability to memorize the "right" answers.

As a legal matter, such foreknowledge invalidates the test battery under civil rights laws, particularly Title VII of the Civil Rights Act. Section 703(h) of that Act permits employers to give and act upon the results of professionally developed ability tests, provided that the test or its administration is not designed, intended or used to discriminate. Under the mandate of Section 703(h), the EEOC has developed "Guidelines on Employee Selection Procedures", which begin with the proposition that:

> "properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies. . . ." 29 C.F.R. § 1607.1 (App., p. 89a).

Under the heading of "Minimum Standards for Validation" of tests, the Guidelines state that evidence in support of a test's validity must be based "on studies employing generally accepted procedures for determining criterion related validity, such as those described in 'Standards for Educational and Psychological Tests and Manuals' published by the American Psychological Association . . ." 29 C.F.R. § 1607.5 (App., pp. 92a-93a).

Standard I5 of the APA Standards referred to in the EEOC Guidelines cited above states the following:

> "I5. The test user shares with the test developer or distributor a responsibility for maintaining test security.
>
> Comment: Test security is a problem whenever a lapse in security can result in changing an individual's score without making a change in his true score. For some kinds of tests a lapse of security would not be serious. If one is to be tested for achieved skill, for example, knowing and practicing the test samples might be highly recommended. In many cases, however, prior knowledge of test items or scoring procedures could destroy validity. The problem is not simply one of cheating. Security may be compromised where examinees have had much prior experience with a popular test, have been taught specific test items, or have heard a lot about the test." Standards for Educational & Psychological Tests, published by the American Psychological Association (1974), p. 67.

It is undisputed on this record that the test battery in issue is not a test for achieved skill, but rather an aptitude test where "prior knowledge of test items could destroy validity." (Ibid).

Standard J2 of the same APA Standards cited in the EEOC Guidelines states the following:

> "J2. Test scores should ordinarily be reported only to people who are qualified to interpret them. If scores are reported, they should be accompanied by explanations sufficient for the recipient to interpret them correctly.
>
> Comment: There are difficult problems associated with the question of who should have access to test scores within an organization. Certainly, curious peers should not have access to them. An individual who must make the ultimate decision to admit or to reject or to hire or to reject, or to certify or not to certify, must have the interpretation. One useful (and unanswered) question is whether such a person who lacks the training necessary for the interpretation of scores should be given that training or should be given only the interpretations of scores." Id. at p. 68.

By turning over the test scores to unions and thereby to the employees represented by the unions, access to the test scores is thereby given to "curious peers".

This Court on at least two recent occasions has held that the EEOC Guidelines on Employee Testing are entitled to "great deference" and to be regarded as "expressing the will of Congress." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 430-31 (1975). See also *Washington* v. *Davis*, 96 S.Ct. 2040, 2053 n.16 (1976). In the *Albermarle* case the Court expressly noted with approval that the EEOC Guidelines "draw upon and make reference to professional standards of test validation established by the American Psychological Association", 422 U.S. at 431.

From the foregoing, therefore, it is evident that disclosure of the actual test and the actual test scores of individuals taking the tests to unions and employees represented by unions, who have no professional obligation not to publicize the tests and test scores, will invalidate the tests both as a practical matter and under Title VII of the Civil Rights Act. Invalidation of testing as an employee selection device, both in private industry and government, may well lead to unqualified persons being placed on jobs of critical importance, such as the job in question in the present case, to the detriment of the employees, employer and the public at large. The Company involved in this case is a large public utility—a classic example of a "business affected with a public interest" (*Munn* v. *Illinois*, 94 U.S. 113 (1877)). As such it has a duty to its consumers and the public to take all reasonable precautions to determine that only qualified personnel perform important jobs. Validated, job related testing is a business necessity essential to carry out that duty.[2]

The above described impact on testing as an employee selection device distinguishes this case from this Court's decision in *NLRB* v. *Acme Industrial Company*, 385 U.S. 432 (1967), holding that Section

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[2] Another practical barrier to the continuation of validated employee testing posed by the decision below is that disclosure of the test battery and test scores to the Union by the Company's professional psychologists places such psychologists in a clear violation of the APA Code of Ethics. As dissenting Judge Weick succinctly stated:

> "The disclosure of the test papers as well as the individual scores, would subject the psychologists to the sanctions of disciplinary action which could result in their suspension or even revocation of their licenses by the State of Michigan" (App., p. 9a).

8(a)(5) requires a Company to furnish a Union with information probably relevant and of use to the Union in carrying out its statutory duties and responsibilities. Even conceding, *arguendo*,[3] the proposition that the test battery and test scores were within what this Court referred to in *Acme* as a "discovery-type standard" of materials ordinarily to be furnished to a Union in the processing of a grievance, the destructive impact of production of the test battery and test scores on testing and the selection of qualified personnel to perform important jobs in a safe and competent manner makes this case a distinctly different one from *Acme*.

The only response of the Board and Court below to the Company's stated concern that disclosure of the tests and test scores to unauthorized persons will invalidate the tests was the invention by the Board, and its approval by the Court below, of a "restriction" on the Union's use of the tests and test scores. Dissenting Judge Weick charitably characterized this "restriction" as "really naive". Among the reasons it is naive are the following:

1. A violation of the copying and dissemination provisions in the Board opinion (no protective provision appears in the Board's Order) would be most

[3] It must be noted, however, in this case that the Company gave the Union a wealth of information about the test battery; that the uncontradicted testimony of expert witnesses was that in view of the information furnished by the Company the production of the test battery itself was unnecessary; and that the arbitrator himself ruled, in light of the extensive materials about the tests that the Company did furnish, the production of the actual test battery was irrelevant to the Union's processing of the grievance in arbitration (App., p. 72a).

difficult, if not impossible, for a company to enforce and police once it has given a union the test materials required by the Board order. At that point it has lost control over the materials, and "test security" in accordance with standard I5 of the APA Standards quoted above and the EEOC Guidelines incorporating those standards have been breached.

2. As organizations properly responsive to their members' desires, unions are in a uniquely poor position to prevent intentional or inadvertent dissemination[4] of test materials, particularly in view of the ubiquitous copying machine. In addition, the employee leadership of the union to whom the materials are to be given changes on a regular basis, thereby permitting those employees who had seen the materials, and any other employees to whom they had shown the materials, to have an unfair advantage when and if they take the test in the future.

3. Even if the union were found to violate the protective provisions contained in the Board's Opinion, the Company remedy is speculative at best. It is difficult to conceive of a contempt proceeding being brought in the Court of Appeals against a union that has not been found guilty of an unfair labor practice.

4. Even if the union were liable in contempt for a violation of the protective provision, there is no ade-

[4] Inadvertent disclosure by non-psychologists can be illustrated by the case of *Davis* v. *Washington*, 348 F.Supp. 15 (D.C. 1972), where Judge Gesell entered an order sealing the Civil Service examination in question "because it is given on a regular basis to many federal job applicants", only to have the dissenting judge on the Court of Appeals append the entire examination to his opinion. See *Davis* v. *Washington*, 512 F.2d 956, 967 (D.C.Cir. 1975), reversed, *Washington* v. *Davis*, 96 S.Ct. 2040 (1976).

quate remedy for the violation, since the tests will have been hopelessly invalidated and it would take years to validate a new test.[8] The only sanction against the union would be punitive, not remedial—a very small source of comfort to a company whose testing program had been gutted.

For the above stated reasons, the "restriction" placed by the Board and Court below on the use of the tests by the Union does not make the case any less important or the problems posed by it any less recurrent.

The construction of Section 8(a)(5) of the National Labor Relations Act utilized to achieve this result is unprecedented in the forty-two year history of the Board. Never before has the Act been construed to require employers to turn over to unions aptitude tests and test scores achieved by named applicants. Indeed, in the only other reported case on the subject the Board's General Counsel refused to issue a complaint on the ground that the items on the test had a "unique character" and that:

> "[W]hile it [the Company] would bargain concerning the general subject of the tests, it would not furnish specific test questions, since advance inspection thereof would permit their content to be widely disseminated and thus impair the usefulness of the test." *International Telephone & Telegraph, Federal Division,* 22-CA-499, 46 LRRM 1387 (1960).

The present record is replete with evidence of Company bargaining on the subject of the test battery and

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[8] The evidence in this case showed that it took seven years to validate the power plant operator test battery.

the production to the Union of information concerning the test battery. It is also replete with uncontradicted testimony from expert witnesses from both within and outside the Company that, in view of the information funished by the Company, the Union did not need the test battery itself to evaluate the fairness of the test, and the arbitrator in the arbitration proceeding underlying his case so found. The only information withheld, in fact, was information whose production would invalidate the test battery. As found by dissenting Judge Weick, the Board decision and its affirmation by the Court below took into account only the Union's interest, completely ignoring the Company's interest in its testing program, and constituted a gross abuse of discretion.

The administrative and judicial creation of such an absolute, or, in the Court's language, "paramount" requirement forty-two years after the passage of the Act and in the above stated circumstances alone raises a significant and recurring question of statutory interpretation which should be resolved by this Court. When it is considered in addition that the creation of such a requirement leads inevitably to the invalidation of testing programs across a broad spectrum of American industry and government which utilize such programs, the need for review becomes compelling.

II

The Decision Below Raises A Conflict Between the Sixth and Second Circuits

In *Kirkland* v. *Department of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), a class of minority applicants for promotion to a position within the

New York State Department of Correctional Services, filed a civil rights complaint under 42 U.S.C. 1981 and 1983 challenging, *inter alia,* a State Civil Service examination which the State used to determine the successful applicants for the job. The Second Circuit agreed with the District Court that the examination was not job related and had a discriminatory impact on minorities, but reversed the District Court's order requiring that any new test for the position in question be furnished by the State to the minority applicants for their prior review. The Court held:

> "The District Court ordered that the new test prepared by defendants be submitted to the plaintiffs for review. We find this requirement difficult to comprehend. Presumably, this examination will be taken by members of the plaintiff class in competition with others. Permitting advance review by plaintiffs would place all others at a competitive disadvantage. If the District Judge is seeking professional assistance from plaintiffs' expert, his order should so provide; and proper steps should be taken to insure confidentiality." 520 F.2d at 427.

The *Kirkland* case and the relationship of civil rights legislation concerning testing to the Board's order under Section 8(a)(5) of the National Labor Relations Act were extensively briefed to the Sixth Circuit by the petitioner. That Court, however, chose to ignore that relationship and thus created a conflict over the propriety of giving applicants for positions opportunity for advance review of tests to be taken in the future for entry to these jobs.

This, of course, is not the classic conflict in the sense that two circuit courts of appeal have construed the

same federal law in different ways. In a way, it is a more pervasive conflict since it reflects a judicially created conflict in the inter-relationship of the National Labor Relations Act and civil rights legislation (Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981). This petitioner and the multitude of other companies and governmental bodies which use job related tests stand in the middle of this conflict. Because of the importance of testing in obtaining qualified candidates for important jobs and because of the widespread use of testing, this Court should resolve this conflict.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

No. 75-2192

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THE DETROIT EDISON COMPANY, *Respondent*.

ON APPLICATION for Enforcement of an Order of the National Labor Relations Board.

Decided and Filed August 10, 1977.

Before: WEICK and LIVELY, Circuit Judges; and CECIL, Senior Circuit Judge.

LIVELY, Circuit Judge, delivered the opinion of the Court, in which CECIL, Senior Circuit Judge, joined. WEICK, Circuit Judge, (pp. 9-12) filed a separate dissenting opinion.

LIVELY, Circuit Judge. The question in this case is whether the National Labor Relations Board abused its discretion in directing The Detroit Edison Company to deliver to a union which represented certain of its employers the psychological aptitude tests used in determining eligibility for promotion together with the answer sheets and scores of employees who took the tests. After conducting a hearing on an unfair labor practices charge filed by the union the administrative law judge found that the information sought by the union was relevant and would be of use to the union in carrying out its statutory duty as the bargaining representative of the employees and that failure to furnish the requested information was a violation of Section 8(a)(5) of the National Labor Relations Act. The administrative law judge directed Detroit Edison to give to the union the

scores of the individual applicants. However, he directed that the tests and actual answer sheets of the applicants be delivered "only to a qualified psychologist selected by the Union to act in its behalf in this matter . . . ." He further ordered that

> the psychologist shall be free to fully advise the Union concerning these tests, so that the Union may fully protect the rights of the employees in the appropriate unit; the Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests, or otherwise use them for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests.

Both parties filed exceptions to the decision and order of the administrative law judge, but Detroit Edison limited its exceptions to that portion of the decision and order which required it to turn over to the union actual test scores of identified individual employees. The company did not except to the finding that it had engaged in an unfair labor practice by refusing the union's request for the test materials, but requested the Board "to adopt that part of the order which requires the test be turned over to a qualified psychologist selected by the Union . . ."

The Board, in its decision and order which is reported at 218 NLRB No. 147, affirmed the rulings, findings and conclusions of the administrative law judge and adopted his recommended order with one modification. It ordered Detroit Edison to supply copies of the tests and answer sheets and scores directly to the union rather than to a qualified psychologist selected by the union, while adopting the restrictions placed on use of the materials by the administrative

law judge. The matter is before this court on an application for enforcement filed by the Board and a petition for review filed by Detroit Edison. We conclude that the order of the Board should be enforced.

The dispute in this case arose when Detroit Edison posted notices of six vacancies in the classification of "Instrument Man B" at its Monroe generating plant. Ten employees from the Monroe unit applied for promotion to the posted position, but all failed to achieve the "acceptable" score set by the company on a battery of psychological aptitude tests. The vacancies were filled by promoting employees with less seniority from other units of Detroit Edison who scored at or above the recommended level. The union filed a grievance under the terms of the collective bargaining agreement and requested the company to deliver to it the actual tests that were given and the answers sheets and scores of the employees who took the tests, asserting that these documents were needed in processing the grievance. Though the grievance proceeded to arbitration, the union filed an unfair labor practices charge for failure to furnish the requested information and it was stipulated that the arbitrator's decision would not be final until there had been a disposition of the unfair labor practices charge.

The collective bargaining agreement provided that promotions would be based on seniority "whenever reasonable qualifications and abilities of the employees being considered are not significantly different . . . ." The union conceded in the arbitration proceedings that the company had established the right to use standardized tests as a measure of an employee's qualifications, but contended that it could only police the contract by examining copies of the tests and actual test papers when an issue of fairness related to the testing procedure was raised. Detroit Edison contended that the tests were designed only to predict future success in a particular job and did not measure existing skills and knowledge; therefore, it argued, the sample

questions and descriptive literature of the tests together with validation studies were all that would be required to judge its fairness. The company also charged that disclosure of the actual test battery and answer sheets to the union would inevitably lead to dissemination of questions and answers. With respect to the answer sheets and test scores of individual employees, Detroit Edison claimed "confidentiality" as justification for not turning these documents over to the union. During the unfair labor practices proceeding the company offered to disclose the actual tests to a qualified industrial psychologist on behalf of the union, to let the union's lay representative take the test and to furnish the answer sheets and actual scores of individual employees if the employees consented.

It is the duty of an employer generally to provide to the authorized representative of its employees information which the representative needs to perform its duties. *N.L.R.B.* v. *Acme Industrial Company*, 385 U.S. 432, 435-36 (1967); *N.L.R.B.* v. *Truitt Manufacturing Comany*, 351 US. 149 (1956); *Kayser-Roth Hosiery Co., Inc.* v. *N.L.R.B.*, 447 F.2d 396 (6th Cir. 1971); *N.L.R.B.* v. *Rockwell-Standard Cor.*, 410 F.2d 953 (6th Cir. 1969). Referring to permissible Board action directing an employer to deliver such requested information to a union, the Court in *Acme Industrial Company, supra,* at 437, said: "It was only acting upon the probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." Matters related to seniority and eligibility for promotion under a collective bargaining agreement satisfy the test of probability of relevance to the duties and responsibilities of the union representing employees under that agreement. Since Detroit Edison unilaterally selected the standardized tests to be included in the examination for Instrument Man B and unilaterally determined the cutoff point below which no applicant would be considered eligible for promotion to

that classification, the union was entitled to information about the tests.

Without actually contesting the finding that the tests, answer sheets and scores are relevant, Detroit Edison argues, in effect, that the circumstances of this case are such as to require that the tests and answer sheets be delivered only to a qualified psychologist. The Supreme Court held in *N.L.R.B.* v. *Truitt Manufacturing Company, supra,* 351 U.S. at 153-54, that "[t]he inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." Detroit Edison points to this court's decision in *Kroger Company* v. *N.L.R.B.*, 399 F.2d 455 (6th Cir. 1968), as supporting its position. There the court denied enforcement of a Board order which directed delivery to a union of an entire management program which covered many areas of managerial concern other than the specific matter which was in dispute at the time the request was made. The court noted that the union request for disclosure was cast in very broad terms and that there was no showing that the information requested was needed for any currently unresolved grievance. In *Kroger,* the court stated that ". . . it is perhaps significant in this case that the Union's showing of need for purposes of collective bargaining is more general and theoretical than immediate and practical." *Id.* at 457. These comments are not descriptive of the present case. The request from the union in this case was in very specific terms and arose out of an unresolved grievance. Considering "the circumstances of the particular case," *Truitt, supra,* the *Kroger* court concluded that the company did not commit an unfair labor practice in refusing to deliver the requested information.

We have also examined *Emeryville Research Center, Shell Development Company* v. *N.L.R.B.*, 441 F.2d 880 (9th Cir. 1971), and *Shell Oil Company* v. *N.L.R.B.*, 457 F.2d 615 (9th Cir. 1972), but they too are distinguishable from

the present case. In *Emeryville* the court found that the union's demands were overbroad and its stated reasons for wanting the information were very general, and that the company was not afforded an opportunity to comply because of failure of the union to specify its needs. In *Shell Oil Company* v. *N.L.R.B., supra,* the court found that the employer had declined to turn over the names and addresses of all employees of a unit to the union because of a *bona fide* concern that nonunion employees would be harassed, as they had been during a recent strike. The court also found that the company made a reasonable offer of a substitute method by which the union could contact all employees but that the union adamantly refused to retreat from its original demands.

In the present case Detroit Edison argues that the "circumstances of the particular case" are that the actual battery of tests which it uses will be of no value to the union and that if the tests fall into unauthorized hands they will be of no future use to the company though a great deal of effort and expense has gone into their selction and validation. It is possible that the union will not be able to make any determinations about the fairness of the tests by itself and that it will need the advice of a psychologist. Nevertheless, that is a decision that the union should be allowed to make rather than a condition to its right to examine the tests. This may be a case where it would have been better if the union and Detroit Edison had been able to agree upon a neutral party to receive the documents, *see General Electric Company* v. *N.L.R.B.*, 466 F.2d 1177, 1185 (6th Cir. 1972); but in the absence of such an agreement the Board did not err in dispensing with the administrative law judge's recommendation that the documents be delivered only to an industrial psychologist. The answer to Detroit Edison's concern about the possibility of the tests falling into unauthorized hands is found in the Board's adoption of the administrative law judge's limitations on

use of the materials by the union. The restrictions on use of the materials and obligation to return them to Detroit Edison are part of the decision and order which we enforce. Violation of these provisions would be subject to the same sanctions as violation of any provision of a judicially enforced order of the Board. Because of its experience in such matters and its administrative competence the Board is vested with a broad discretion in fashioning remedies. *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 216 (1964). The corresponding scope of judicial review is narrow. *N.L.R.B.* v. *Local No. 106, Glass Bottle Blowers Association,* 520 F.2d 693, 697 (6th Cir. 1975). Applying these principles, we find no abuse of discretion in the remedy ordered by the Board in the present case.

Both the administrative law judge and the Board ordered the company to give to the union actual test scores linked to the names of the employees who took the tests. The company argues that it would be a breach of confidentiality to disclose the actual scores of employees who did not achieve the recommended grade and that it would "involve probable misuse of such scores, needless embarrassment, humiliation and harassment of those taking the tests." Detroit Edison asserts that it assured each employee who took the test that the scores would not be disclosed, and that management itself has not had access to the scores of identified employees. A similar promise that relevant economic data would not be disclosed to third parties was held in *General Electric Company* v. *N.L.R.B., supra,* not to present a valid defense when an employer was requested to disclose relevant information to the union. The requirement that the bargaining representative be furnished with relevant information necessary to carry out its duties overcomes any claim of confidentiality in the absence of a showing of great likelihood of harm flowing from the disclosure. *Shell Oil Company* v. *N.L.R.B., supra,* 457 F.2d at 618-19; *United Aircraft Corporation* v. *N.L.R.B.,*

434 F2d 1198, 1207 (2d Cir. 1970), *cert. denied,* 401 U.S. 993 (1971).

The company also contends that disclosure of the actual test battery and of the linked test scores would involve its industrial psychologists in a breach of their professional ethical code. The American Psychological Association filed a brief as *amicus curiae* contending that the Board's order ignores the interests of psychologists, the tested employees and future examinees as well as users of the test battery, including Detroit Edison. The court has considered all of these interests and has concluded that the principles which underlie the National Labor Relations Act are paramount in this case. Detroit Edison cannot rely upon an asserted privilege which is personal to the employees who took the examination, and we are not informed of any rule of law under which the professional code of the American Psychological Association can stand as a barrier to the right of a duly chosen and certified collective bargaining representative to receive information of use to it in carrying out its duties and responsibilities. The Board showed its consideration for the expressed concerns of the company and the Psychological Association by adopting the limitations on use of the material recommended by the administrative law judge.

The application of the Board for enforcement is granted, and the petition for review is denied.

WEICK, Circuit Judge, dissenting. The Order of the Board, which the Court enforces, protects only the interest of the union, and does not recognize, or even consider, the conflicting interests of the employer, Detroit Edison. The Board's Order destroys the value for future use of psychological tests which Detroit Edison had validated at great expense, by requiring Detroit Edison to turn over to the union the battery of tests, including the test papers. These test papers were in the custody of qualified psychologists

employed by the company (employer), to which papers even company management had no access, and the disclosure of such papers would violate the Code of Ethics of the American Psychological Association which has been recognized by the statutes of the state of Michigan, Mich. Stat. Ann. § 14.677(1)(b).

The Board's Order also required the company to turn over to the union the test scores of each employee who had taken the tests and link to his name his test score, notwithstanding the fact that psychologists had assured each examinee that such score would be kept confidential and would not be disclosed to anyone without his written consent thereto. None of the examinees had given such consent. A confidential and privileged relationship thus existed between the psychologists who gave the tests and the examinees.

The disclosure of the test papers, as well as the individual scores, would subject the psychologists to the sanctions of disciplinary action which could result in their suspension or even revocation of their licenses by the state of Michigan.

Detroit Edison did, however, furnish to the union a wealth of material, which included: The company's 1970 validation report of the tests; the 1972 National Compliance Company validation report; Explanations of the battery of tests given; Representative sample questions from the batteries; the test scores of all of the applicants, but without revealing which examinee received the score.

The company further offered to divulge to the union the name and test score of any examinee who consented thereto, but the union declined to request such consent from any of its members.

The company further offered to permit the union's representative, Mr. Clem Lewis, to take the tests.

The company further offered to turn over to a qualified psychologist selected and employed by the union, all of the withheld material which the union requested. This would have afforded at least some protection to the company, as the union's psychologist would have been bound by the same ethical code as that binding the company's psychologist, but the union even refused to accept this offer.

The Administrative Law Judge did enter a partial protective order which did protect the battery of tests but not the test papers or the names and scores of the examinees who took the tests. This order was as follows:

> [T]hat the purposes of the Act will best be effectuated if Respondent be directed to supply copies of the battery of tests administered to the employee applicants for the position of Instrument Man B in this proceeding (necessary to check the accuracy of the scoring of the tests), only to a qualified psychologist selected by the Union to act in its behalf in this matter, such submission to be made within 10 days after Respondent receives notification of the individual selected. The psychologist shall be free to duly advise the Union concerning these tests, so that the Union may fully protect the rights of the employees in the appropriate unit; the Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests. After the conclusion of the arbitration proceeding or if no request is made to reopen the arbitration hearing within 90 days after the psychologist receives the battery of tests, all copies of the battery of tests shall be returned to Respondent. See *Fawcett Printing Corp.*, 201 NLRB 964. (A. 38)

The company filed exceptions only to that portion of the protective order which required the company to turn over to the union the raw test scores, identified by the name of the employee, and the test papers of the applicants.

The material which the company did furnish to the union was, in my judgment, sufficient to permit the union to process adequately the grievance pending before the Arbitrator, or to perform its duties under the collective bargaining agreement. The furnishing of all of the papers requested by the union would have required the assistance of a psychologist, but the union declined to accept such offer. These papers simply could not have been evaluated by a lay person.

This, in my judgment, implies that the union did not wish to be bound by any ethical considerations, but wanted to be free to use the test papers for any purpose it desired.

But even the partial protective order of the Administrative Law Judge, which order was little enough, did not satisfy the Board. The Board reversed the partial protective order and ordered that the company turn over all of the material requested, but imposed upon the union the same conditions as those which the Administrative Law Judge imposed on the psychologist. This was really naive. Member Kennedy dissented, stating:

> The majority's modifications of the remedy recommended by the Administrative Law Judge are not justified. There is no professional obligation on the part of the union not to publicize the tests or their results. I do not see how this Board can enforce its exhortation not to copy or to disclose the tests.

Detroit Edison was vitally concerned in securing qualified applicants for a critical position. Its testing program

has been nullified by the action of the Board. In a case where the union had requested information which was too broad and covered many facets of managerial concern, we stated in an opinion written for the Court, by Judge Edwards, in *Kroger Co.* v. *NLRB*, 399 F.2d 455, 457 (6th Cir. 1968):

> To us the critical problem appears to be how to recognize and how adequately to protect each of the conflicting interests that are involved here.

These interests include the company, the examinee, and the psychologists. In *Kroger* we set aside the Board's order and denied enforcement.

Since the Board did not follow the criteria of *Kroger*, but recognized and enforced only the interest of the labor union, its order constituted a gross abuse of discretion and it ought not to be enforced.

No. 75-2192

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

THE DETRIOT EDISON COMPANY, *Respondent*.

Order

BEFORE: WEICK and LIVELY, Circuit Judges; and CECIL, Senior Circuit Judge.

No judge of this court having favored ordering consideration en banc of the petition for rehearing filed herein by the respondent, the petition has been referred to the hearing panel.

Upon consideration of the petition for rehearing the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied. Judge Weick dissents.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By GRACE KELLER
Grace Keller, Deputy Clerk

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 7—CA—10276(2)

THE DETROIT EDISON COMPANY

and

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, AFL-CIO

Decision and Order

On January 29, 1975, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, the Respondent and the Union filed exceptions, supporting briefs, and answering briefs; and a brief *amicus curiae* was filed by Michigan Psychological Association.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs [1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order as herein modified.

We agree with the Administrative Law Judge that the Respondent violated Section 8(a)(5) of the Act by refusing to provide the Union with copies of the battery of aptitude tests administered to the employee applicants for the position of Instrument Man B, including the actual test papers of the applicants and the actual test scores made by each employee. For purposes of remedying this violation, we

[1] The Respondent's request for oral argument is hereby denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

agree with the Administrative Law Judge that the Respondent should be required to submit the test scores to the Union, but, contrary to the Administrative Law Judge, we believe that the test papers themselves should also be submitted directly to the Union, rather than "only to a qualified psychologist selected by the Union to act in its behalf in this matter" and, through him, to the Union.

The Administrative Law Judge has required the intervention of a psychologist to receive the test papers because he believes that the mere submission of the tests to lay union representatives is not likely to be productive of constructive results. It may well be that the Union will find it necessary to retain a psychologist to interpret the concept of Respondent's tests and assist it in fulfilling its responsibility to represent the employees. But it does not follow from the existence of this possibility that we should condition the Union's access to this information. As the bargaining agent of the employees involved, it is the Union which is entitled to information which is necessary to its role as bargaining agent in the administration of the collective-bargaining agreement. We have found that the information requested by the Union here may be of value to the Union in fulfilling its responsibility to the employees. We believe it is reasonable to assume that, having requested the papers, the Union intends effectively to utilize them. Consequently, we would not condition the Union's access to the information on the retention of a psychologist but rather would have Respondent submit the information directly to the Union and let the Union decide whether the assistance or expertise of a psychologist is required.

Like the Administrative Law Judge, we are concerned with protecting the tests from such disclosure as would destroy their future utilization. Although directing Respondent to supply copies of the tests and the actual test papers to a qualified psychologist, the Administrative Law Judge accorded to the Union the right to see, study, and

use them to the extent necessary to process and arbitrate the grievances for which they were requested, and then to return them to Respondent, "but not to copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests," as more fully explained by the Administrative Law Judge in the section of his decision entitled "The Remedy." While we are making the tests available directly to the Union, we shall, in order to preserve their future utility, impose the same restrictions upon their use by the Union as recommended by the Administrative Law Judge.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified herein, and hereby orders that the Respondent, The Detroit Edison Company, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

Substitute the following for paragraphs 2(a) and (b) and reletter the remaining paragraphs accordingly:

"(a) Submit to the Union copies of the battery of tests administered to employee applicants for the position of Instrument Man B at the Monroe Power Plant in November or December 1971, or January 1972, including the actual test papers of the applicants, and the actual test scores made by each applicant, in accordance with this Decision."

Dated, Washington, D.C., June 30, 1975.

Howard Jenkins, Jr., Member
John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

MEMBER KENNEDY, concurring in part and dissenting in part:

I would affirm the Decision of the Administrative Law Judge in its entirety. The majority's modifications of the remedy recommended by the Administrative Law Judge are not justified. There is no professional obligation on the part of the Union not to publicize the tests or their results. I do not see how this Board can enforce its exhortation not to copy or to disclose the tests. Accordingly, I would adopt the remedy recommended by the Administrative Law Judge.

Dated, Washington, D.C.

Ralph E. Kennedy, Member
NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 7-CA-10276(2)

THE DETROIT EDISON COMPANY, *Respondent*

and

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, AFL-CIO, *Charging Party*

John A. Ciaramitaro, Esq., for the General Counsel.

Ralph H. Houghton, Jr., Esq., (*Fisher, Franklin & Ford*), Detroit, Mich., for the Respondent.

Mr. Clement J. Lewis, Washington, D.C., for the Charging Party.

Decision

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard at Detroit, Michigan, on September 23, 1974, upon a complaint issued on August 8, 1974, based upon a charge filed by the above-named Charging Party (herein "the Union") on April 4, 1973. The complaint alleges that, following the filing of a grievance concerning qualifications for and promotion to the position of Instrument Man B, the Union, on and after March 5, 1973, requested the above-named Respondent (herein "the Respondent") to furnish the Union with the aptitude tests administered to each of the employee applicants for promotion to the position of Instrument Man B, including those promoted and not promoted, the examination papers of those applicants, and their test scores, and that the Respondent, in violation of Sections 8(a)(1) and (5) of the Act, since on or about March 15, 1973, has refused to furnish the Union with the information described.

Respondent's answer to the complaint, as amended at the hearing, admits the factual allegations set forth above, with certain affirmative averments considered hereinafter, but denies commission of the alleged unfair labor practices. Respondent's answer admits allegations of the complaint sufficient to justify the assertion of jurisdiction under current standards of the Board (Respondent, a public utility located in Michigan, during a recent annual period, received supplies shipped in interstate commerce valued in excess of $5,000,000, and during the same period sold electrical energy to customers in the State of Michigan valued in excess of $250,000), and to support a finding that the Union is a labor organization within the meaning of the Act.

Upon the entire record in this case,[1] from observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Union, and the Respondent, I make the following:

Findings and Conclusions[2]

A. SUMMARY OF THE FACTS AND ISSUES

Since about 1943, the Union has been certified as the bargaining representative of Respondent's employees in approximately 28 different appropriate units (Resp[illegible]'s exh. 25, pp. 2-5). Among these, the Union was cert[illegible] by the Board, on April 1, 1971, as the bargaining representative of operating and maintenance employees of Respond-

[1] The record includes transcripts of 5 days of hearing bef[illegible] an arbitrator. These have been given careful study.

[2] Respondent in its brief submitted proposed findings of fact and conclusions of law which have been fully considered. These are accepted only to the extent they are consistent with the findings and conclusions set forth hereinafter.

ent's production department at its Monroe Power Plant.[3] These employees, including the job classification of Instrument Man B at that plant, were covered by a collective-bargaining agreement between Respondent and the Union effective from June 16, 1969 through June 12, 1972, which has been succeeded by another agreement negotiated in 1972.

In late 1971, Respondent determined that six positions in the classification of Instrument Man B should be filled at its newly constructed Monroe Power Plant. The position, while at the lowest starting grade under the bargaining contract, and usually requiring training on the job, is considered a critical job by Respondent because it is involved with maintenance of plant instrumentation, vital to the operation of the plant, and is the natural path for advancement to higher Instrument Man classifications. Basically in accordance with provisions of the bargaining agreement, notice of the vacancy was posted (Respondent's variation from normal procedure is irrelevant to the issues herein), and first consideration was given to applicants from the Monroe Power Plant, as required by the contract.

The posted requirements for the Instrument Man B job were 1) satisfactory high school credits for 2 years of math and 1 year of science, 2) a satisfactory physical examination, 3) a minimum of "recommended" on the required Instrument Man aptitude tests selected by Respondent, and 4) a satisfactory attendance record. Ten Monroe Plant em-

[3] The complaint alleges, the answer admits, and I find that the following constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: "All operating and maintenance employees of Respondent's Production Department at its Monroe Power Plant, but excluding supervising operators, student engineers, training personnel, professional employees, technical employees, office clerical and plant clerical employees, part-time employees, temporary employees, seasonal employees, guards, foremen, assistant foreman, and all other supervisors as defined in the Act, and all other employees."

ployees bid the job. All were rejected for failure to make the cut-off score of 10.3 on the aptitude tests.[4] Over 30 employees from other units covered by the contract who also bid the job were then considered. One, Elliott, who was an incumbent instrument man in another unit was selected without the necessity of taking the aptitude tests. Of the remaining applicants from the other units, the five most senior men who made a score of 10.3 or better on the tests were selected for the open positions.

On January 20, 1972, the Union filed a grievance asserting that the testing procedure used was unfair and that six senior men from the Monroe Power Plant should have been selected. Respondent rejected this grievance at all steps of the grievance procedure and eventually the grievance was taken to arbitration.

During the processing of the grievances, including the arbitration proceeding, the Union requested certain information (as considered more fully hereinafter), including the actual tests used in the examination of the applicants and the scores each of them made. These were refused by Respondent basically on grounds of confidentiality, as discussed in more detail later. The arbitrator held that he had no authority to order Respondent to give the Union the information sought. Respondent also asserts (and the Union denies) that the arbitrator also held that the information sought by the Union was irrelevant to the disposition of the grievance.

The arbitrator, as we shall see, directed that Respondent should give further consideration to three applicants who fell below the Respondent's 10.3 cut-off mark, and otherwise denied the Union's grievance. Thereafter, Respondent

[4] One of these, Wiley, had passed a prior aptitude test given by Respondent for the position which set lower standards than the present battery of tests. He was permitted to take the new battery, but failed to make the cut-off score.

asserts that it considered the three applicants as directed by the arbitrator, found that one had additional qualifications that overrode his failure to make the cut-off score, and selected him for the position of Instrument Man B at the Monroe Power Plant. The Union protested that all three should have been selected. This issue has been heard by the arbitrator, but no decision on the issue has been made.

As has been noted, the major issues involved here concern whether Respondent should give the Union the actual examination tests which were administered to the job applicants and the scores each of them made on the tests. Respondent asserts that it was justified in refusing to give the Union this information because it was not "relevant or necessary for the purpose of pursuing [the grievance] or for any other reason." (Ans. to complaint, par. 13) Respondent also contends that these matters are confidential and that disclosure of the actual tests would utterly destroy the future use of the tests and the efforts Respondent has made to make sure that the tests are valid for the purpose used.

B. The Tests

For some time Respondent has been engaged in the process of testing employees for promotion into certain trades classifications in an effort to determine in advance (that is, to predict) whether they have a potential to learn and perform well in the new classification. These tests are not designed to test the skills or knowledge of the applicant which may be related to the job, but the capacity or aptitude of the employee to be trained and to do the job efficiently. These tests have been constructed or assembled by the Industrial Psychology Division of Respondent's Employment Department. Respondent has not extended this testing procedure to all the trades or classifications in which it might be used. However, in about 1958, because of

the significant importance of the Instrument Man classification, the Industrial Psychology Division, apparently using the validation procedures discussed below, assembled a battery of three tests to be given to applicants to that position in Respondent's operations. Nevertheless, prior to the latter part of 1969, supervisory personnel responsible for the Instrument Man functions complained that the battery of tests used did not provide competent men. In the latter part of 1969 and the first part of 1970, the Industrial Psychology group began a process of revalidating the tests being given for promotion into the Instrument Man classification. This process of validating such psychological tests, as described in the record, is as follows: In one stage of the process the psychologist, after carefully studying the job function involved in depth and in detail, with assistance from supervisors of that function, would select certain job tasks that were considered to be representative of the job as a whole in range and difficulty. In the case of the Instrument Man this consisted of 23 job tasks. (Resp. Exh. 13) Based upon these job tasks, supervisors of the instrument men were asked to mark the incumbent instrument men as to how each of them performed on the job. From these reports, the psychologist rated the incumbents on a numerical scale on the basis of their competency. At the same time, according to Dr. William L. Roskind, Respondent's Director of Industrial Psychology, the psychologist, as a result of his analysis of the job, "would have some hypothesis about which aspects of the job, which aptitudes can be measured, which aptitudes would, in fact, predict successful performance on the job," and he "would then go to the catalogues of tests by research and so on, and look for tests that would measure the aptitudes . . . that you hypothesize [are] relevant to that job."[5] This battery of tests selected by the psychologist would then be given to the incumbents who had already been rated by supervisors and the psy-

[5] In some instances it was indicated that the psychologist might construct his own test questions.

chologist on their performance on the job. As stated by Dr. Roskind, ". . . if we picked out six tests [that] we would hypothesize would, in fact, produce performance . . ., in running one of these validating studies . . ., we would determine which tests actually do predict performance. Which ones will, in fact, predict the high performance individuals and which the low [performers]. . . . Those tests on which the poor performers did poorly and the high performers did well would be the test that we would select for use in selecting [test] batteries for the future."

In summary, then, when the results of such a battery of tests administered to a representative group of employees already on the job compare favorably with the performance of the incumbents on the job as rated by their supervisors and the psychologist, the tests are considered valid (that is predictive of future performance on the job.)[6]

As a result of pursuing this process, about early 1970, Respondent's Industrial Psychology group decided that a battery of two standardized, widely-used tests were valid for the purpose of statistically predicting which employees would be likely to do well in the Instrument Man job.[7] A report of the methods that were followed to arrive at this decision was prepared (Resp. Exh. 13). In 1972, Respondent employed an independent testing firm which revalidated Respondent's study and issued a written report as to its findings. (Resp. Exh. 14)[8]

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[6] See also, Dunnette, *Personnel Selection and Placement* (Wadsworth Pub. Co. 1966). It is also to be noted that in scoring the results of the tests given, the psychologist apparently does not use raw scores, but weighs and correlates the scores among the various tests given.

[7] The two tests, each of which is apparently sold commercially by certain psychological organizations, are 1) The Minnesota Paper Form Board Test, and 2) the Engineering and Physical Sciences Aptitude Test (EPSAT). One test previously used as part of the battery, since 1958, was dropped.

[8] This revalidation appears to have been part of Respondent's

The answers to the tests are of a multiple choice variety, the applicant marking his choice on the test sheet himself. The scoring is done by means of a key superimposed on the test sheet. It appears that Respondent seeks to avoid any subjective influence in the actual scoring of the tests. It is admitted that human error does occur in the scoring of the tests, though Respondent seeks to correct this by rechecking.

The cut-off score. As previously noted, when the Instrument Man battery of tests was administered to the applicants for the position involved in this case, those who made a score of less than 10.3 were rejected by Respondent from further consideration. Exactly when this cut-off score was established and why this particular point was selected is less than clear from the material presented in this record. Since the original 10 applicants from the Monroe Plant were rejected for failure to meet that standard, it is assumed that the cut-off point was selected at the time the test battery was selected, though there is no specific reference to that in Respondent's exhibits 13 and 14. The discussion in the arbitrator's decision at pp. 16-17 (based upon material not in the present record) also indicates that the cut-off was based upon the performance of the incumbents in 1969-1970, used to validate Respondent's testing program. The arbitrator found, as considered hereinafter, that Respondent in selecting a point which tended to maximize the probability that the applicants selected would succeed, "did more than eliminate only those who had no chance of succeeding," it "increase[d] the number of people who

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efforts to prepare for litigation in which it has been involved under the Civil Rights Act of 1964. See *Stamps, et al.* v. *Detroit Edison, et al.*, 365 F. Supp. 87 (E.D. Mich., 1973). The Union was a defendant in that case. It would appear, however, that in making this revalidation, the employees were not retested, contrary to some indications in the record, for Dr. Roskind, Respondent's Director of Industrial Psychology, testified that the independent company did not actually utilize the tests being validated.

were rejected, some of whom would have succeeded." While the arbitrator found that the setting of the score at 10.3 was not "in itself arbitrary," he was convinced that "the manner in which the test score [was] applied does border upon arbitrary action."

It is noted that, in disposing of the issues in *Stamps* v. *Detroit Edison, supra,* involving other psychological test batteries used by Respondent in screening employees, the Court came to a similar conclusion, stating (365 F. Supp. at 118):

> None of the test batteries here in issue were demonstrated to be administered with cut-off scores which are reasonable in that they screen out only those applicants likely to possess insufficient ability to perform on the job. On the contrary . . . the cut-off scores were demonstrated to be so high as to reject applicants whose scores are equal to the scores of employees who have been sufficiently able to perform in the past. The continued use of these test batteries, even if demonstrated to be valid predictors of job success, without adjusting their cut-off scores to a more reasonable level is unlawful.

C. The Contract Provisions

Two sections of the applicable collective-bargaining agreement relate to the promotion of employees. In pertinent part, Art. VII, Sec. 13 provides: "In promotion of employees . . . to classifications within the same bargaining unit, seniority will govern whenever reasonable qualifications and abilities of the employees being considered are not significantly different. 'Significant difference' shall be 'head and shoulders difference,' . . ." Art. VIII, Sec. 38(b), similarly provides, in pertinent part: "If such vacancy is not filled by a member of the bargaining unit, notice of the vacancy shall be posted in other bargaining units of the same department. . . . If the reasonable qualifications and

abilities of the employees being considered as a result of this posting are not significantly different, total length of service in the Company shall govern. 'Significant difference' shall be 'head and shoulders difference'. . . ." By "head and shoulders" difference, the parties seem to mean a substantial or obvious difference, more than a shade of difference, among the men considered.

D. The Grievance Process

In the grievance filed by the Union, filed January 20, 1972, it is asserted that "the testing procedure used was unfair in filling the six vacancies in the Instrument Shop. The bidder from Monroe Power Plant should have been selected."

In Respondent's written reply, dated January 21, 1972, Fred J. Locke, Technical Engineer, noted that "None of the Monroe Power Plant grievants who were by-passed . . . met the selection standards of the Instrument Repairman Aptitude Test. . . . Since they did not meet the required posted qualifications for this test, they were not selected."

The minutes of the First Step Meeting between Respondent and the Union on the grievance, dated February 22, 1972, prepared by Respondent as required by the agreement, show that the Union protested the fact that the test was adopted without consultation with the Union, which was characterized as an arbitrary action by Respondent, and requested that it be informed of the cut-off score on the new and the old tests, as well as the difference between the two tests. The Union was informed that the new tests were the same as the old except that one specific test had been dropped from the battery. According to the minutes, the Union was told that the cut-off score ("the point of acceptability") was "arrived at through the use of a formula, there is not a percentage score as such," and that

when the present battery of tests was decided upon, "the cut-off score was adjusted. This adjustment was validated through a sample of 33 employees presently performing the work as related to their test results."[9] It appears that the Union was not given the cut-off scores requested. At a later point, the minutes state that the Union protested that the new cut-off point was "not only unfair, but unknown." During the course of the discussion, the minutes state that "The Union asked if [Respondent] would furnish scores of the Monroe personnel. Management felt that furnishing the results would not accomplish anything."

By letter dated February 25, 1972, Respondent denied the grievance on the ground that the tests given were valid and Respondent was satisfied that the cut-off score was "justifiable."

The minutes of the step 2 meeting on this grievance, dated May 19, 1972, prepared by Respondent, reveal the parties taking substantially the same positions as in the first step meeting, including discussions on the merits of the grievance with which we are not concerned here. The last item noted: "8. The Union has asked for test scores, but they haven't named the grievants other than the senior men at the plant."

By letter dated May 24, 1942, Respondent again reviewed the facts, found no violation of the agreement, and denied the grievance.

The Union appealed this decision to the president of Respondent, and, on August 29, 1972, the president's delegate replied, by letter, in pertinent part, as follows:

> A second complaint of the Union is that the men at Monroe were disqualified because of tests and the Company did not demonstrate a "head and shoulders"

[9] "Presently" apparently refers to 1970, when the test was validated as Respondent asserts.

> difference between them and those who were selected. They also point out that changes in the test standards were not discussed with them, nor were they informed.
>
> A basic qualification is a standard that must be met before a comparative evaluation can be made on a "head and shoulders" basis. . . .
>
> In this instance, one basic qualification was that applicants have been found acceptable under a new test standard established in 1970 after the requirements for the position of Instrument Man had been restudied and reevaluated. It has been the custom to inform the Union test revalidation studies, but in this case the explanation and information to the Union were inadvertantly overlooked.
>
> • • •
>
> It is evident that the Union does not have a complete understanding of test validation, establishment of standards, development of test batteries, and similar information relating to the Company's testing program. To that end, I am directing that a meeting for Union Officers and Chairmen be arranged to enhance their understanding of the Company's objectives in the testing area. A mutually acceptable date will be worked out prior to November 1, 1972.
>
> The grievance is denied.

Although it appears that Respondent's position, as set forth in the above letter, is that the aptitude tests constitute an "entrance qualification" for the job (see Resp. Exh. 7, p. 22)—and not a method of making a "head and shoulders" comparison among the applicants required by the contract—Respondent's testimony at the arbitration hearing indicates the contrary. Thus Emil Ruch, Director of Union Relations, Lawrence E. Kanous, who was instrumental in setting up the Instrument Man aptitude test, and Dr. Roskind, all testified that passing the tests constituted

a "head and shoulders" difference, emphasizing the importance of the cut-off score. Kanous asserted, therefore, that an applicant who made one point over the cut-off score would be head and shoulders over an applicant who made one point under the cut-off. At another point, Kanous testified that the test should be only a part of the determination whether an applicant received the job, not the sole determinant. Notwithstanding the letter quoted above, the terms of the notice posting the job, counsel's statement to the arbitrator, and the general trend of the record, Dr. Roskind testified in the present hearing that the aptitude tests were to be considered as only one factor in the selection process.[10]

By letter dated October 27, 1972, the Union requested arbitration of the dispute between Respondent and the Union concerning this grievance.

E. Union Requests for Information

As previously noted, the complaint *alleges* and the answer *admits* that the Union requested the Respondent to furnish the Union with the aptitude tests administered to each of the employee applicants for the Instrument Man position, including those selected and not selected, the examination papers of those applicants, and their test scores. Respondent's brief seems to question the adequacy of the requests for the "examination papers," however. (Brief pp. 5, 18)

The record shows that the Union through Mr. Lewis, Union Director of Services, made its first written request for information in connection with the Instrument Man

[10] Compare Respondent Counsel's statement to the Union in his letter dated July 18, 1973: "I appreciate the fact that you are questioning whether or not there is a 'head and shoulders difference' between those who were selected for the job and those who were not. We, of course, look at the issue as being one of whether the applicants meet the minimum qualifications for the job."

grievance on March 5, 1973, in preparation for the arbitration hearing which the Union had requested. In that letter the Union requested "the following exhibits and material":

1. The actual battery of tests used in the captioned matter.
2. The method of scoring or grading and the actual criteria for finding 'acceptability' or 'recommended' or 'not recommended.'
3. A report on the test validation.
4. A report by the National Compliance Company, which, as I understand it, consulted upon, and reviewed the Company's whole testing system or apparatus.

In response, Respondent's counsel, by letter dated March 15, 1973, confirming an earlier telephone conversation, advised that Respondent would meet with Lewis on April 2, 1973, adding, however, "As I explained, the actual battery of tests used in the testing program are confidential and in order to insure the future integrity of those testing procedures, they cannot be released. Mr. Roskind had indicated, however, he would be pleased to discuss the testing procedures with you, as well as explaining the validation procedures, etc."

At the meeting on April 2, the Union was given a copy of Respondent's Report of the study made in 1970 on the Instrument Men tests (Resp. Exh. 13) and the report made by the National Compliance Company on these tests (Resp. Exh. 14). Respondent refused to give the Union the actual scores made by the applicants or the battery of tests used. No other information concerning this meeting appears.

By letter dated May 23, 1973, to Dallas Jones, the arbitrator designated to hear the grievance in this matter, the Union requested the arbitrator to have the Respondent

supply the Union with "copies of the actual tests used by 16 candidates who applied for the Instrument job," stating, in pertinent part:

> We have previously asked the Management of Detroit Edison Company to supply us with the actual tests which were the instruments to effectively foreclose grievants in the above matter from entering training, trial or promotion to Instrument Man classifications at the Monroe Plant of Detroit Edison. . . .
>
> . . . the Arbitrator has the right and duty . . . to order a party to produce certain records necessary to the case of the other side and relevant to the case at bar. . . .
>
> We regard the actual tests as essential, and, perhaps key, to our case. . . .
>
> • • •
>
> Much has been said about the secrecy and confidentiality of these tests. . . . What this advocate needs to know is if the questions on those tests are reasonably relevant to the Job being considered. This could be an important point in our defense.

As set forth hereinafter, the arbitrator denied the Union's request.

After the close of the initial arbitration hearing on this matter, the Union continued to seek such information. Respondent's letter dated July 10, 1973, refers to Union letters dated June 2 and June 26, and responds, in pertinent part, as follows:

> . . . We have made a diligent attempt to provide you with all the information you will need in order to have a competent psychologist properly analyze these tests and the testing procedure.

> As I advised you at the arbitration hearing, the actual test score of the employees have always been considered extremely confidential by the Company . . . none of the employees involved have given the Company any express permission to release this information. Therefore, as we previously indicated, we must respectfully decline your request for that information . . . during the hearing we did present . . . the range of actual scores attained by the grieving employees who are involved in this case.[11]
>
> With respect to your request for the actual tests themselves, again I would advise you that these have been considered confidential by the Company and we could not comply with your request without destroying the future validity of those tests. Furthermore, I am advised by Mr. Roskind and Mr. Kanous that such disclosure would be violative of Principle 13 of the Ethical Standards of Psychologists. From a practical standpoint, which I am sure you can understand, the Company has spent tens of thousands of dollars in validating these studies and tests which were utilized in this case. . . . Therefore, from all standpoints, it is necessary that we maintain the confidentiality of those tests. Furthermore, . . . a competent, trained psychologist can properly study and evaluate the tests and the validation procedures with the information you already have . . . and, furthermore, even if he [had the tests], they would be of no particular use in reaching a decision as to whether or not the tests were properly validated and utilized.

In this letter, Respondent did enclose material in response to the Union's request for information pertaining

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[11] At the arbitration hearing, Respondent gave the scores made by certain participants in the test, but refused to state which applicants made which score.

to the battery weights and method of scoring both the Minnesota Paper Form Board Test and the EPSAT test.

On August 6, 1973, in recognition of the Union's concern over its position if the Board ordered disclosure of the information sought contrary to a different opinion of the arbitrator, the parties entered into a stipulation, later acknowledged by the arbitrator, that "if the Company ever in fact is ordered to disclose the tests and does in fact disclose the actual tests as a result of a final court order, then [Respondent] would be agreeable to having the arbitrator listen to any additional argument or evidence based upon the disclosure of the tests which might affect his decision with respect to the substantive issue in the grievance. In view of the fact that ultimate disclosure through a court test would take several months or possibly years, . . . [We] feel . . . you ought to decide the issues and then let the chips fall where they may with respect to the National Labor Relations case."

F. Arbitration

The initial hearings in the arbitration case were held on May 23, 24, 30, and 31, 1973. According to the arbitrator's decision, however, the hearing was not declared closed until September 18, 1973. (Resp. Exh. 12, p. 9.) During the intervening period as noted above, the Union continued to request information concerning the tests and scores, and the parties agreed that the arbitrator should proceed to decision notwithstanding the pendency of the instant matter. On July 23, 1973, the Arbitrator ruled that he did not have the power to require that the requested information be furnished to the Union. On December 3, 1973, the arbitrator issued his decision, stating, in pertinent part (exh. 12, pp. 9-12, 13, 14, 15, 16-17, 17-18, 18-19):

> . . . the Company's position is that it has the right to establish minimum, reasonable qualifications for a job, including the attainment of an acceptable score on a

> reliable and valid test, and that Article VII, Section 13 does not come into play until these qualifications are met. The Union's position is that the contractual mandate requires an examination of all relevant information to determine if an employee is "head and shoulders" above another employee and that an employee cannot be disqualified on the basis of one item.
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> • • •
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> . . . one of the basic issues involved in the dispute [is] does the Company have the right to establish minimum, reasonable qualifications for a job? The Arbitrator believes that the Company does have that right. While Article VII, Section 13 gives weight to seniority "whenever reasonable qualifications and abilities of the employees being considered are not significantly different," it does not, on its face, preclude the establishment of reasonable qualifications to perform the job before the measurement of qualifications and abilities begins. . . . The testimony adduced at the hearing indicates that the Company has resisted every attempt by the Union to restrict that right.
>
> This holding does not mean, however, that the Company can by-pass employees in a unit who meet the minimum qualifications in the hope of obtaining better qualified employees in other units. It is only when none of the bidders meet the reasonable established qualifications for the job, that the Company can move to the next step of the procedure.
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> • • •
>
> There is no doubt that the Company has established and maintained the right to use tests as a measure of an employee's qualifications—the Union concedes this point. The Union has, however, raised several questions not only in regard to the use of the test, but in regard to the test itself.
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> • • •

A great deal of the testimony and evidence was concerned with the test battery itself. The Union questioned the validity of the test by reference to the type of questions asked. It was to further this line of questioning that the Union desired a copy of the test. But this was simply a questioning of the face validity of the test.[12]

Such questions, even if taken from the test itself, prove nothing. Face validity does not prove or disprove the validity of the test in determining the aptitudes necessary for successful job performance. There would be justification in the Union's request if the test were measuring job knowledge.

In support of its argument for disclosure of the test, the Union cited Central Soya Company, 41 LA 1031. Frankly, the Arbitrator believes this decision was in error if in fact the tests used were standardized aptitude tests of the type here in question. The Arbitrator believes a better precedent is Wisconsin Electric Power, 36 LA 46901. In short, the Arbitrator does not believe that the Union's position was damaged in any way by lack of access to the test.

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There is no doubt that as tests go, this particular test has a high degree of validity. The way in which it was developed and is used also overcomes many of the objections raised by arbitrators and industrial relations practitioners; that is, the test was developed especially

[12] Both before the arbitrator and at the hearing in this matter, Respondent's witnesses asserted that a layman could not tell whether the questions on the tests were job related, and therefore the questions had no "face validity." Those witnesses also asserted that qualified industrial psychologists do not need to see the test questions either in order to determine whether the test is "valid," but that this can be done by study of statistics and published reports about the tests.

for this job (job related), and it has been properly validated.[13] In addition, and very important, the instant test is not used to compare one employee against another in terms of the score attained.

• • •

Nevertheless, tests are not perfect predictors of success —and the Company does not claim otherwise—even when they have high validity as here; they simply increase the probability of successful performance if a certain score is attained. But even when that score is attained there will be people who will not succeed, and there will be people who would have succeeded even though their scores were below the cut-off point. This point is illustrated by the scatter diagram contained in the Company Exhibit No. 1.

This diagram makes clear that individuals who score less than 9.2 (or 9.3) have virtually no chance of succeeding. It is also clear that by establishing the cut-off score of 10.3 the accuracy of the prediction is increased —13 of the 16 above average performers scored 10.3 or better while 13, and perhaps 14, of the 17 below average performers scored less than 10.3. But it also increases the number of people who are rejected, some of whom would have succeeded. Thus, between 9.3 and 10.3 there were three who were rated above average and six who were not.

If the cut-off score had been set from 9.0 to 9.3, the Arbitrator would have no difficulty in saying that if an individual did not attain that score he should re-

[13] However, it is noted that the battery of tests involved here were standardized tests. There is no proof in the record that they were developed to test the Instrument Man job. The tests were selected by the Respondent's Industrial Psychology group because in their personal judgment it was thought that these tests would predict which employees would do well on the job.

ceive no further consideration; one could then compare the cut-off score, as the Company has done, to having one hand or two, being color blind or not, etc. But that is not the case here. By setting the cut-off score at 10.3, the score which produces the best results in terms of predictability, it does more than eliminate only those who have no chance of succeeding.

The Arbitrator does not believe that the setting of the cut-off score at 10.3 was in itself arbitrary; this has been done for good reason as noted. But the Arbitrator is convinced that the manner in which the test score is applied does border on arbitrary action. There is no doubt—although there were some late protestations to the contrary—that those individuals who did not attain an "acceptable" score were removed from any further consideration. This seemingly differs from testimony by the Company's psychologists concerning the proper use of tests. . . .

. . . Based upon the evidence, it is clear that an individual who scores 10.3 is far more likely to succeed than one who does not. It clearly indicates a significant difference between two such employees *unless* there is something in the individual's background which would offset this lower score. In fairness to the senior employee, there should be such an investigation; otherwise seniority is undermined.

. . . Certainly, such experience, work or educational, cannot offset scores of below 9.3. In fairness to those grievants who scored between 9.3 and 10.3, however, it seems to the Arbitrator that the parties should review their qualifications to see if they do have qualifications that were not fully considered and that would offset their failure to attain a 10.3 score.

• • •

Award

. . . Company did not violate the agreement by establishing . . . an "acceptable" score on the Instrument Man test battery as a general qualification for selection into the Instrument Man B classification. The attainment of such a score creates a presumption of "significant difference" over the failure to attain such a score, unless offset by relevant educational or job experience. The Company is obligated to consider such evidence and cannot disqualify an employee without such consideration. Certain of the grievants, as indicated hereinbefore shall have their qualifications reviewed to determine if such qualifications offset their failure to attain an "acceptable" score. In the event it is found that any or all of these grievants have the qualifications necessary to offset the "not recommended" score they received on the aptitude test, they shall be promoted into the Instrument Man B classification.

Respondent thereafter determined that three applicants for the position had received scores on the tests between 9.3 and 10.3, and reconsidered them on the basis of their education and work experience. Respondent decided that one of these men had a background that offset his failure to attain the 10.3 cut-off score and promoted him to the Instrument Man B position. On July 18, 1974, the arbitrator heard the Union's protest that all three men should have been promoted. No decision has been rendered upon this rehearing. During the course of this reopened hearing, the arbitrator stated that in his opinion the Union was entitled to receive the specific scores attained by the applicants on the tests in order that the Union be able to "police the contract." This information has not been given the Union.

G. Respondent's Positions

As has previously been noted, Respondent contends that the tests given for the Instrument Man B position and the specific scores made by named applicants should not be given to the Union for the following reasons: It is asserted that 1) the validity of the tests cannot be determined from observation of the questions in the tests, but only by study of the research manuals prepared by publishers of the tests, and the statistical and other data prepared by those who administered the tests in situations which, it is claimed, validate the tests (as described hereinabove in section B), and, therefore, the Union does not need the tests; 2) the test questions are confidential, and if revealed to persons other than qualified psychologists would lose their value, for the tests depend, in part, "on the naivete" of those who take the tests;[14] 3) the scores of the individual applicants are also confidential, Respondent assertedly having advised the applicants that they would not be disclosed. Respondent also asserted some concern that those employees making low scores would be embarrassed and possibly harassed by other employees; and 4) it would violate certain principles of the code of ethics of the American Psychological Association to reveal the contents of the tests or the scores. In pertinent part, these principles state: "Psychological tests and other assessment devices, the value of which depends in part on the naivete of the subject, are not reproduced or described in popular publications in a way that might invalidate the techniques. Access to such devices is limited to persons with professional interests who will safeguard their use." "Test scores, like test materials, are released only to persons who are qualified to interpret and use them properly."

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[14] As previously noted, in a communication from Respondent to the Union, it was stated that the Respondent had spent "tens of thousands of dollars in validating these studies and tests. . . ."

Respondent presented two witnesses, Dr. Roskind of its own staff, and Dr. Marvin D. Dunnette, professor of psychology at the University of Minnesota, in support of the positions noted above. In general these witnesses, or one of them, supported, or tended to support, the positions set forth above. There are certain significant qualifications which should be noted, however:

(1) With respect to the term "validity," the testimony of the witnesses soon made clear that they were using the term to describe tests that would fulfill employer's purpose —to maximize the probability that those who passed the tests would do well on the job. When it was suggested to Dr. Dunnette that the studies and statistics that would satisfy him that the tests were valid for the employer's purpose might not suffice to inform employees with respect to how they were to qualify for promotion—an important part of their working conditions—Dr. Dunnette stated that he had not given any thought to that problem, but agreed that he did not believe in "secrecy as a policy" in dealing with employees concerning their working conditions.[15] Dr. Dunnette finally concluded that the major, or the basic reason for not giving copies of the tests to the Union was that if the tests were given "to potential examinees, the tests would quickly become worthless," "the security of the test demands it not be part of the public domain."[16]

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[15] It is noted that when Dr. Dunnette was asked if copies of the tests would assist *the Union* in determining whether the test were valid, he replied that "I would not regard the test as helpful *to me* in making that judgment." I believe that the transposition of terms was careful and deliberate.

[16] It is noted that Dr. Roskind, who made the decision not to give the test copies to the Union, testified that he made the decision only on the basis that submitting the tests to the Union would 1) destroy "test security" in that the tests would become known to applicants, and 2) violate professional ethical standards. This conforms to Dr. Dunnette's final position.

A similar dichotomy arose when Dr. Dunnette sought to describe the difference between the term "validity" and the term "job related" as applied to the tests at issue. It is perfectly plain that though the two concepts may overlap, they are not in all respects the same. The distinction, as given by Dr. Dunnette, tended to become confusing, as in the following testimony:

> Q. (Mr. Houghton) Earlier . . . you were asked to [compare] the term validity and job related. And then you said that job related was a broader term. . . . How is job related different than the way you've been using validity?
>
> A. I think some things can be said to be job related though not necessarily be shown to be job related in a statistical study. An obvious example I guess, would be that—I think medical school education would be related to the job of being a physician, but I'm not sure that I would talk about medical school education being valid, necessarily, to be a physician. It's just, you know, necessary. So I think that job related term can be broad in that it connotes a number of other kinds of prerequisites.
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> • • •
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> A. As I've been using the term validity it is one important part of job related.
>
> Q. Okay, so it's a part of, although not quite as broad as job related?
>
> A. Yes.

Both Dr. Roskind and Dr. Dunnette agreed that if different questions were used, or different tests were given, than those selected by Respondent in the first instance, different results would be expected. In such case, it is said the tests would have to be revalidated.

It is also of some significance, in assessing Respondent's contention that the actual tests are not needed in order to determine whether the tests are discriminatory in their application, that the Department of Justice, in processing the civil rights suit against Respondent also insisted on seeing the actual tests given and actual scores made on the tests. According to Dr. Roskind, the tests were finally submitted to "their industrial psychologist [w]ith a stipulation that he would protect their confidentiality." Respondent also submitted test scores of those employees who signed releases.

(2) The contention that employees making low scores might be embarrassed and harassed is based upon speculation from certain vague hearsay testimony given by Dr. Roskind. It is admitted that the employees would be aware, before the arbitration, which applicants had made a score less than 10.3, and after the arbitration, those who made less than 9.3.

(3) Respondent's counsel also indicated at the hearing in this matter that, in order "to appease the Union in this case," Respondent "would be willing to disclose the tests to a qualified industrial psychologist . . . for a determination on behalf of the Union." Indeed, counsel stated Respondent "has offered" to do this. However, I am not aware of any evidence showing that such offer was made and it is not referred to among the 50 requested findings of fact in Respondent's brief. Indeed, the tenor of Respondent's responses to the Union's requests, as set forth in counsel's letter dated July 10, 1973, was that the Union's psychologists would not need to see the tests.[17]

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[17] On the other hand, Lewis, the Union's representative, testified at the hearing that "turning [materials] over to a professional psychologist doesn't sit well with us. We think the people on the firing line ought to understand the criteria put forward for promotion. It shouldn't be sent to some professional psychologist. Why shouldn't the [Union] chairman of each plant understand the criteria for promotion? This is our problem."

(4) At the hearing, though not stressed in the brief, Respondent took the position that it would give a detailed analysis of any employee's performance on the tests to the employee, but would not do this for the Union unless the individual authorized it.

Subsequent negotiations. The issues with which we are concerned here arose under the collective-bargaining agreement which expired on June 12, 1972. It is Respondent's contention that in the bargaining for a succeeding contract in 1972, the Union sought provisions which would give the Union access to psychological tests in the future, but that a new contract was agreed without any change in the provisions involved here, upon the Respondent's commitment to discuss these matters with the Union thereafter. I am not satisfied that the evidence in the record justifies the findings sought by Respondent on this point. The matter was first brought up by Respondent upon redirect examination of its last witness, Dr. Roskind, who admitted to only hearsay knowledge of the situation. Counsel also referred to testimony in the transcript of the arbitration hearing on the point. However, General Counsel was not a party to that proceeding, and had no opportunity to cross-examine witnesses with first-hand knowledge of the facts in that proceeding, or properly develop the matter. Indeed, it is far from clear what point Respondent is seeking to make. Counsel agreed at the hearing that "certainly it can't constitute waiver" of the Union's legal rights. Although Respondent requested findings of fact on the point, it made no argument in its brief that the facts had any bearing on the resolution of the issues in this case. In the circumstances, further discussion of this point does not seem warranted.

H. Analysis and Conclusions

It is here contended that Respondent violated the Act when it refused to disclose to the Union 1) the psycho-

logical tests administered to employee applicants for promotion to certain jobs in the bargaining unit represented by the Union, and 2) the scores made on the tests by the specific applicants, where Respondent disqualified certain of the employees for promotion solely on the scores made on those tests. The Union sought the information for the purpose of processing the grievances of employees thus rejected by Respondent for promotion. While the Union's asserted right to this information was under consideration by the General Counsel upon the charges filed in this case, the merits of the grievances were arbitrated under the provisions of the bargaining agreement between the Union and Respondent. The parties had stipulated that, notwithstanding the pendency of this case, the matter should proceed to arbitration, and that should it be held finally as a result of this proceeding that the Union should be given the materials which it sought, contrary to a decision by the arbitrator, the arbitration proceeding might be reopened to consider any union argument based on this information. Inasmuch as the parties have agreed that the arbitrator's decision on this point should not be final, it is necessary to determine whether Respondent violated the Act by refusing to submit the information requested.

It is well established that a labor organization which is obligated under the Act to represent employees in a bargaining unit with respect to the terms and conditions of their employment is entitled, by operation of the statute, upon appropriate request, to such information as may be relevant to the proper performance of that obligation. See *Curtiss-Wright Corporation* v. *N.L.R.B.*, 347 F.2d 61 (C.A. 3); *Stahl Specialty Company*, 175 NLRB 129; *Cowles Communications, Inc.*, 172 NLRB 1909; see also *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432, where the Supreme Court held, at p. 437, that in requiring an employer to furnish information to the Union for the purpose of processing a grievance to arbitration, the Board acts "only upon *the*

probability that the desired information is relevant, and *that it would be of use* to the Union in carrying out its statutory duties and responsibilities." (Emphasis added.)

1. *Relevance of the information sought*

Respondent, at the outset, contends that the complaint should be dismissed because the Union has not shown a need for the information which Respondent has refused to give the Union. I find this argument to be without merit. The Union is entitled to data which is "reasonably necessary to [its] role as bargaining agent in the administration of [the] collective-bargaining agreement;" "wage and related *information* pertaining to employees in the bargaining unit is *presumptively* relevant, for, as such data concerns the more of the employer-employee relationship, a union is not required to show the precise relevance of it unless effective employer rebuttal comes forth." See *Curtiss-Wright Corp.* v. *N.L.R.B., supra,* at 68, 69. See also *Cowles, supra,* at 1909. As the Court in *Curtiss-Wright* further stated: "Reasonable necessity for the union to have relevant data is apparent; necessity is not a separate and unique guideline, but is directly related to the relevance of the requested data" 347 F.2d at 69.[18]

The information here sought concerns criteria unilaterally adopted by Respondent and used to determine which employees should be given an opportunity for, or be selected for promotion. Criteria for promotion constitute a significant element in an employee's working conditions, for they determine whether the employee will be advanced in position, obtain better working conditions, and qualify for higher wages. They are, therefore, clearly wage related and go to the core of the employer-employee relationship.

[18] In *Acme Industrial, supra,* where information was sought to assist a union in processing grievances, the Supreme Court noted that a liberal standard of relevance should be applied, 385 U.S. at 437. The cases cited by Respondent are not to the contrary.

Such criteria are mandatory subjects of bargaining, see i.e. *Clifton Precision Products etc.,* 156 NLRB 555; *Houston Chapter, Associated General Contractors,* 143 NLRB 409, and, in fact, standards for promotion were treated in the bargaining agreement in effect at the time the grievances in this matter arose. In the circumstances, therefore, I find that the information sought by the Union in this case was presumptively relevant. It is necessary therefore, to consider Respondent's evidence in asserted rebuttal of this presumption.

Respondent strongly asserts that access to the test questions would be of no assistance in determining the validity of the tests given, but that statistical and related data which are available to the Union are sufficient to prove the validity of the psychological tests for the purpose used. Therefore the Union does not need the tests. The claim, however, stretches this concept of statistical validity too far. The statistics may, indeed, tend to show that the tests are valid to serve *the employer's purpose*: i.e., they may serve to identify those employees likely to do well on the job. See *Psychological Testing and Industrial Relations,* Hagglund and Thompson Eds. (Center for Labor and Management, College of Bus. Adm., Univ. of Iowa, Monograph, 1969) Ch. I.[19] However, the statistics do not serve to inform the employees, or their representative, whether the tests are truly job related or contain objectionable distortions (it is admitted that "valid" and "job related" are not coextensive), whether they have built-in bias and are, in fact, discriminatory, or whether, in sum, they tend to undercut Respondent's contract commitment to promote by seniority where there is no "significant difference" between the "reasonable qualifications and abilities" of the applicants for promotion.

[19] It is noted, however, that an earlier set of tests, apparently statistically validated in the same way as the present battery, did not, in fact, work out as the employer expected.

In collective bargaining generally there is a normal conflict between the usual employer position that only the most competent employees should be considered for promotion and the usual union contention that promotion should be granted on the basis of seniority. See *Psychological Testing and Industrial Relations, supra,* Ch. II. A common compromise, as in this case, provides that seniority shall govern where abilities and qualifications are approximately equal. It is obvious that Respondent's testing procedure—which is designed to eliminate all but the more, at most, competent (or potentially the most competent)—appears to have a tendency to distort the contractually agreed upon standards. I shall consider the arbitrator's comments on this point hereinafter.

Since the Union was given no opportunity to see the tests or the questions or participate when the battery of tests was selected, or when they were administered, or at any time thereafter, the Union has been deprived of any occasion to check the tests for built-in-bias, or discriminatory tendency, or any opportunity to argue that the tests or the test questions are not well suited to protect the employees' rights, or to check the accuracy of the scoring. In short, however much the statistical data may prove that the tests are valid for the employer's purpose, there is no evidence that the statistics are valid to inform the employees of the criteria required for promotion, or to afford the Union the data required to protect the employee's rights under the statute and the contract. Indeed, if Respondent's total position in this case were sustained, employers using psychological testing—which is a fast growing device for personnel placement—may be enabled, by unilateral action, to freeze the employees' bargaining agents out of significant parts—perhaps most—of the promotional process.

I deem it quite significant that, although Respondent's independent expert, Dr. Dunnette, originally testified that

the Union had no need to know the content of the tests because the statistical data showed the tests to be valid, when it was suggested that the employees' right to know the criteria governing their working conditions involved a totally different concept, Dr. Dunnette stated he had not thought of that and shifted his position—concluding that the basic, or major reason the Union should not be given the tests or the test questions was their asserted confidential nature. This issue will be considered hereinafter.

It is also worthy of note that when the Department of Justice was investigating the alleged discriminatory nature of Respondent's psychological testing under the Civil Rights Act, the Department was not satisfied with the statistics allegedly showing that the tests were valid, but insisted upon the tests, themselves, which Respondent supplied to the Department's own psychologist.

Respondent also for reasons of asserted confidentiality which are considered later in this decision, has refused to give the Union the test scores made by the specified applicants for promotion in this matter. Contrary to Respondent's contention, the arbitrator, who passed on the merits of the grievances, stated, during the reopened hearing, after his initial decision, that, in his opinion, the Union could not adequately "police" the contract without this information. The arbitrator, in fact, directed Respondent to reconsider its selection process, in part, based upon the scores received by the applicants.

For the reasons stated I find that the record establishes a "probability that the desired information is relevant and that it would be of use to the Union in carrying out its statutory duties and responsibilities." See *Acme Industrial, supra.* As previously noted, the Union and Respondent agreed, in effect, that the Board should not defer to the arbitrator's opinion on this issue. I have nevertheless given it careful consideration.

It is important to note, however, that I am not required, nor do I find that the information sought would be found determinative or significant, in fact, by an arbitrator passing on the merits of the grievances. I am required only to consider whether the information sought has "potential value" for the purposes for which it is sought, see *Curtiss-Wright, supra,* at p. 70. The Union is not required to play "a game of blind man's bluff" in determining whether and how to process the employees' grievances. See *Acme Industrial, supra,* at 438-439. None of us know whether the contents of the tests will, in fact, assist the Union.[20] Indeed, the arbitrator stated only that he did "not believe that the Union's position was damaged by lack of access to the test." However, in the peculiar circumstances before him, he appears to have had little other choice. Thus once the arbitrator determined he had no authority to order Respondent to disclose the information which Respondent refused to give the Union, the arbitrator had to hold that he could proceed without the information, or he would have been unable to come to a complete decision on the issues. In fact, the arbitrator was aware at the time that the parties had agreed that he could leave the issue to be determined in this proceeding *de novo,* as I have done.

It may be further noted, to the extent that the arbitrator's opinion of the significance of the tests to the Union's purpose was based upon his belief that the tests were conclusive for all purposes because they were statistically valid for the Respondent's purpose, or was based upon Respondent's claim that the tests were an entrance requirement—like the physical requirement that the employee applicant have two hands and feet—rather than a method of ascertaining the "qualifications and abilities of the

[20] As the Board said in *Cowles, supra* quoting from a leading court decision, "it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issues." 172 NLRB at 1909.

employees" for promotion (see Art. VII, Sec. 13 of the bargaining contract), the record before me undercuts those conclusions. I have previously discussed the first of these arguments. As to the second, there can be no question, in my mind, that the tests, and the scores made on the tests, are designed to and they do test the "qualifications and abilities" of the employees for the jobs they bid on. It is true that this done in a novel way. Traditionally industry has looked to the employee's past experience to determine what he knew and what he could do. This new method determines what the employee knows and can be expected to do by means of written tests. The fact that they may not test job knowledge, as Respondent claims, does not change this. The bargaining contract speaks only of "qualifications and abilities" for promotion in a very broad sense. The tests given by Respondent do measure the qualifications and abilities of the employee applicants for promotion. The testimony of at least three witnesses for Respondent before the arbitrator confirmed this. This evidence, inconsistent with the arbitrator's opinion, was alluded to by the arbitrator only in passing. Again, as previously noted, if his decision were otherwise, the arbitrator would have been stymied by Respondent's refusal to disclose the tests. (If he found the tests were an element in qualifying the employees for promotion, it is difficult to see how the arbitrator could say the Union did not need them.) These remarks are not intended to be critical of the arbitration decision. Labor Arbitration is a pragmatic procedure designed essentially to resolve disputes, not to determine legal rights under the statute. The decision in that case is an excellent example of the process. These matters are raised to indicate that the content of the tests, in fact, do have a potential to affect the employees' rights under the contract. The parties have agreed that if Respondent is ordered to disclose the tests, the arbitrator may still hear arguments to that effect. The arbitrator has concurred.

2. *Confidentiality of the information*

Respondent asserts that it should not be required to disclose the tests to laymen who are likely to disclose them to potential job applicants, because this would destroy the validity of the tests and violate the code of the American Psychological Association. There is inherent in this position the contention that establishment of a new battery of tests on each occasion when jobs are bid would be costly and difficult. Respondent also contends that it should not be required to disclose the scores made by specific applicants on the battery of tests here under consideration because Respondent promised the applicants that the scores would be kept confidential, because the code of the American Psychological Association requires that they be kept confidential, and because Respondent fears that employees may suffer embarrassment if other employees know the scores made by the applicants (Respondent asserts a concern that the applicants would be harassed). Respondent does say that it is the Company's practice to discuss with the *individual applicant*, in detail, how the applicant did on the tests, upon the applicant's request. Respondent is also willing, it says, to submit the battery of tests to a qualified psychologist on the Union's behalf and to release any individual's score to the Union if the Union will obtain the employee's written release.

In essence, Respondent here contends that, having voluntarily chosen a particular form or mechanism to determine the right of bargaining unit employees to be promoted, Respondent is now precluded by the very devices which it adopted from dealing with the employees' bargaining representative about critical elements of the promotion process, and will deal only with the individual. Such a program, which freezes out the bargaining representative from participation in significant elements of the promotion process, and seeks to substitute individual bargaining therefor constitutes a complete negation of the bargaining process and

the rights of employees guaranteed by the Act. See *N.L.R.B.* v. *Medo Photo Supply,* 321 U.S. 678. Those Board and Court cases which have dealt with similar claims of confidentality as a basis for refusing to disclose relevant information, have rather consistently rejected the asserted defense. See i.e., *General Electric Co.* v. *N.L.R.B.,* 466 F.2d 1177 (C.A. 6) (the company had promised other companies to keep wage data confidential); *Curtiss-Wright Corp.* v. *N.L.R.B., supra,* (job evaluation and wage data of nonunit administrative and confidential employees); *N.L.R.B.* v. *Frontier Homes Corp.,* 371 F.2d 974 (C.A. 8) (asserted confidential selling price lists); *Cowles Communications Inc., supra* (company unwilling to link salaries to specific employees because this might offend employee "sensitivities"); *The Electric Auto-Lite Company,* 89 NLRB 1192 (company claimed it could not release wage data because employees had not authorized release); cf. *United Aircraft Corp.,* 192 NLRB No. 92 (company not required to disclose employees' physical incapacities discovered by company physician, in the absence of relevance "to some particular problem").

Respondent has produced no probative evidence that the employees' sensitivities are likely to be abused by disclosure of the scores.[21] To the extent that odium may be attached to employee applicants who did not pass the tests that is a natural consequence of Respondent's program.

I am not impressed with the argument that we should defer here to an asserted code of conduct of a psychological association. This is not a code of confidentiality which has received sanction in this area of the law so far as I am advised. In any event Respondent is not bound by the code, nor may the code insulate Respondent from the obligations imposed by the Act as a result of Respondent's own voluntary course of conduct. Cf. *United Aircraft Corp., supra.*

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[21] *Shell Oil Co.* v. *N.L.R.B.,* 457 F.2d 615 (C.A. 9), cited by Respondent, is completely distinguishable.

I am persuaded, however, as was the arbitrator, that mere disclosure of the tests to lay Union representatives is not likely to be productive of constructive results. If the tests are to be properly analyzed, this should be done by those who have the expertise to deal with the concept involved. The Union's lay representative in this case, who impressed me as a very able and intelligent man for the purpose, admittedly does not have such expertise. I am sympathetic with the frustration which he expressed in this case that the employees and their shop representatives should be able to handle their own shop problems if properly informed. Nevertheless, in some cases, as this, the technology of the efficiency experts may outrun the ability of the individual to cope. The individual then needs an expert of his own. However, this does not affect the right of the employee, through his representative, to be informed, but may determine the manner or form which the information is submitted. This will be considered hereinafter.

On the basis of the above, and the entire record in this matter, I find that Respondent, by refusing to submit to the Union upon request the battery of tests administered to and the actual test papers used by the employee applicants for the position of Instrument Man B involved in this case, and the test scores of the individual applicants made on the tests, violated Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit set forth in footnote 3 above is appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material to this proceeding, the Union was, and continues to be, the exclusive representative of the employees in the appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to honor the Union's demand for certain information relevant and reasonably necessary to the processing of employee grievances.

6. The aforesaid unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

The Remedy

It having been found that Respondent has violated the Act by failing and refusing to supply the Union with certain information, it will be recommended that Respondent cease and desist therefrom and supply the Union, upon request, with the information. However, for reasons previously stated, it is found that the purposes of the Act will best be effectuated if Respondent be directed to supply copies of the battery of tests administered to the employee applicants for the position of Instrument Man B in this proceeding, including the actual test papers of the applicants (necessary to check the accuracy of the scoring of the tests), only to a qualified psychologist selected by the Union to act in its behalf in this matter, such submission to be made within 10 days after Respondent receives notification of the individual selected. The psychologist shall be free to fully advise the Union concerning these tests, so that the Union may fully protect the rights of the employees in the appropriate unit; the Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests, or otherwise use them, for the purpose of disclosing

the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests. After the conclusion of the arbitration proceeding, or if no request is made to reopen the arbitration hearing within 90 days after the psychologist receives the battery of tests, all copies of the battery of tests shall be returned to Respondent. See *Fawcett Printing Corp.*, 201 NLRB 964.

It is also recommended that Respondent be directed to supply the Union with the scores made on the test battery by specific employee applicants for the position. I find without merit Respondent's contention that the scores made by the individual employees should not be released to the Union unless the Union secures the consent of the individuals concerned. The situation which obtains here was created by Respondent for its own advantage. The Union's obligation is to represent the unit of employees as a whole. Respondent may not frustrate this by requiring the Union to secure the consent of individuals in the unit in order to secure information relevant and reasonably necessary to the enforcement of the collective-bargaining agreement which exists for the benefit of all.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[22]

[22] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Order

Respondent, The Detroit Edison Company, its officers, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with local 223, Utility Workers Union of America, AFL-CIO (herein "the Union"), by refusing to furnish the Union with information relevant and reasonably necessary to the processing of the grievances filed on behalf of employees represented by the Union pursuant to Section 9(a) of the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Within 10 days after notification by the Union of its selection of a qualified psychologist, submit to the individual selected by the Union copies of the battery of tests administered to employee applicants for the position of Instrument Man B at the Monroe Power Plant in November or December, 1971, or January 1972, including the actual test papers of the applicants, in accordance with the provisions of the section entitled "The Remedy" set forth above.

(b) Submit to the Union the actual test scores made by each specific named employee to whom the battery of tests was administered as set forth in paragraph 2(a) of this order.

(c) Post at its Monroe Power Plant copies of the attached notice marked "Appendix."[23] Copies of said

[23] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDG-

notice, on forms provided by the Regional Director for Region 7, after being duly signed by the Respondent's authorized representative, shall be posted by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C.

SIDNEY J. BARBAN
Sidney J. Barban
Administrative Law Judge

MENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL, upon request, furnish Local 223, Utility Workers Union of America, AFL-CIO, with information concerning the battery of tests given to applicants for the position of Instrument Man B, and the scores made by the applicants on the tests, which is relevant and reasonably necessary to the processing of the grievance filed on January 20, 1972, on behalf of applicants who were rejected for promotion to that position.

WE WILL NOT refuse to bargain collectively with that Union by refusing to furnish the Union with such information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act, as amended.

THE DETROIT EDISON COMPANY
(Employer)

Dated ———— By ————————————
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building 1249 Washington Blvd., Detroit, Mich 48226 Telephone No. (313) 226-3200.

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Case: 5430 0720 72

Grievance: PMO-123

IN THE MATTER OF ARBITRATION BETWEEN

LOCAL 223, UTILITY WORKERS UNION

—and—

THE DETROIT EDISON COMPANY, DETROIT, MICHIGAN

Preliminary Statement

This arbitration proceeding has been conducted pursuant to Article V of the parties' Collective Bargaining Agreement, dated July 3, 1972, and under the rules of the American Arbitration Association. The undersigned, Dallas L. Jones, was selected by the parties to serve as the impartial arbitrator. In accordance with Article V, Mr. Douglas McIlroy and Mr. R. W. Schleicher served, respectively, as Union and Company advisors to the Arbitrator.

The hearings were held in Detroit, Michigan, on May 23, May 24, May 30, and May 31, 1973. Both parties were present at the hearings and were given full opportunity to present their testimonial and documentary evidence and to cross-examine witnesses. A verbatim transcript (690 pages) of the proceedings was made. Mr. Clement J. Lewis, Director of Services, UWUA, appeared for Local 223. Mr. Ralph H. Houghton, Attorney, appeared for the Company. Both parties submitted post-hearing briefs.

Opinion

ISSUE:

The basic issue in this arbitration is whether the Company can establish as a qualification for entry into the

Instrument Man B classification the attainment of a minimum score on a test battery designed to determine the aptitudes necessary to successfully carry out the duties of the classification.

The contractual provisions directly applicable to this dispute are:

Article VII, Section 13. Promotions

In promotion of employees covered by this Agreement to classifications within the same bargaining unit, seniority will govern whenever reasonable qualifications and abilities of the employes being considered are not significantly different. "Significant difference" shall be "head and shoulders difference", and such factors as advance licenses or step-up experience shall not of themselves amount to significant differences. If the Management proposes to by-pass any employee with greater seniority, the Management will discuss the matter with the chairman of the bargaining unit involved (at least five (5) days before the by-pass is made effective) in an attempt to reach an agreement thereon before such a by-pass is made. In the event of disagreement, the matter may be processed through the grievance procedure to the President of the Company, or his delegate, whose decision shall be controlling, except that the question of whether the by-pass has been arbitrary or discriminatory may be submitted to arbitration in accordance with Article V of this Agreement. If the arbitrator finds the by-pass was arbitrary or discriminatory, the by-pass will be canceled.

• • •

Article VIII, Section 38. Posting Notices of Vacancies

a. If a vacancy occurs in any one of the bargaining units covered by this Agreement and such vacancy is not filled by promotion or transfer with the group, a

notice of such vacancy shall be posted for a period of five (5) days in the bargaining unit in which it occurs and a copy sent to a Union divisional officer designated by the respective division.

b. If such a vacancy is not filled by a member of the bargaining unit, notice of the vacancy shall be posted in other bargaining units of the same department for a period of five (5) days. If the reasonable qualifications and abilities of the employees being considered as a result of this posting are not significantly different, total length of service in the Company shall govern. "Significant difference" shall be "head and shoulders difference", and such factors as advance licenses or step-up experience shall not of themselves amount to significant differences.

• • •

BACKGROUND:

The Instrument Man B classification is an automatic progression type classification. That is, an individual enters the classification at labor grade T-3 and at six month intervals progresses through the Instrument Man B classification, assuming satisfactory performance, to the Instrument Man A classification. This requires four years. He enters the Instrument Man A classification at labor grade T-12 and in two years progresses to the top of the classification, T-16.

The general duties of the Instrument Man B classification,[1] as set forth in the job description for this classification, are:

> Under indirect and intermittent supervision of the Instrument Foreman, installs, calibrates, tests, adjusts, repairs, modifies, replaces, checks and lubricates a variety of different types of control, alarm, indicating

[1] One job description, the Instrument Man A, is used for both classifications.

> and recording equipment. Performs maintenance on electronic equipment as required. Corrects instrument failure. Builds test equipment. Records calibration data. Works from blueprints, diagrams, drawings. Is a guide for visitors. Assists vendor representatives.

The Instrument Man classification is thus responsible for the instrumentation in a power plant.

The Company has an industrial psychology group. The record indicates that in 1958-1959, this group validated and placed into use a standardized aptitude test battery for determining the capacity of employees to develop the skills necessary to perform the duties of the Instrument Man classification. This battery consisted of three tests: the Wonderlic Personnel Test, the Minnesota Form Board Test and certain portions of the Engineering and Physical Science Aptitude Test (EPSAT). In providing supervision with the results of this test, a three-tiered scoring system was used: "not recommended," "acceptable," and "recommended;" the supervisor does not receive the numerical score attained by the individual. Employees were required to take this test before acceptance into the classification.

This test battery was used until late 1969 or early 1970. The record does not indicate how many employees, if any, who took the test failed to get an "acceptable" score. Only one grievance involving the use of the test in denying an employee a promotion was cited, PC-527 and PC-529. In this instance, a senior employee who had received an "acceptable" score was bypassed by a junior employee who had received a "recommended" score. This grievance was upheld.

Sometime prior to 1969, the technical engineers in the power plants responsible for the instrumentation complained that the test battery was not clearly distinguishing between those individuals who could perform the job suc-

cessfully and those who could not. These complaints led to a re-validation study of the test battery. As a result of this study, the Wonderlic Personnel Test was dropped from the test battery. The three-tiered scoring system was discarded and a two-tiered system was substituted: "not recommended" and "acceptable." The "cutting" score, or "cut-off" score, was set at 10.3; that is, those receiving 10.2 and lower would be placed in the "not recommended" category and those above in the "acceptable" category. The 10.3 cut-off score included a portion of the former "acceptable" range but most of it became a part of the "not recommended" category.

The instant dispute arose at the Monroe Power Plant. This is one of the newer plants in the Detroit Edison system. In November 1970, one unit of the contemplated four units was in use, and a second unit was scheduled to go on the line in a few months. The Company asserts that because it is a new plant, it contains more sophisticated equipment than the older plants. Thus, claims the Company, while the job of the Instrument Man is the same as in other plants, he is required to use more frequently his higher level skills at the Monroe Plant.

In early November 1971, Mr. Fred J. Locke, Technical Engineer in charge of the instrumentation at the Monroe Power Plant, directed that six vacancies for the Instrument Man B classification be posted. However, instead of posting it in conformance with Article VIII, Section 38(a), it was posted in all of the bargaining units of the Production Department. When this error was called to Mr. Locke's attention by Mr. Roger Sprayberry, Monroe Bargaining Unit Chairman, Locke proposed that all the bids received be held unopened until the time for the bidding had expired, those bids received from other units be segregated from those received from the Monroe Plant, and the bids received from other units remain unopened until a determination had been made in regard to those bids received from Monroe. Mr. Sprayberry agreed to this procedure.

The Notice of Vacancy (or bid posting) listed four qualifications for the position: (1) successful completion of two years of high school mathematics and one year of high school science; (2) the successful passing of a physical examination if such an examination were deemed necessary; (3) a minimum score of "recommended" on the Instrument Man aptitude test; and (4) a satisfactory attendance record. Although the Notice of Vacancy listed a score of "recommended," the Company asserts that this was an error and the term "acceptable" should have been used in accordance with the two-tier system which had been placed in effect.

Ten employees of the Monroe plant submitted bids. Only one of these employees, A. Wiley, had taken the test previously; he had received a score of "acceptable" on the former test battery using the three-tier system. Arrangements were made for these men, except Wiley, to take the test. Seven of the nine appeared at the appointed time and took the test. All seven received a score of "not recommended." When it was learned that the score Wiley had received was the equivalent of a "not recommended," he was permitted to take the test again; he received a score of "not recommended." Because none of the Monroe bidders received a score of "acceptable," their bids were rejected.

Mr. Locke then turned to the more than thirty bids he had received from other units. Two of these bids were from employees who were incumbents; even though they had not taken the revised test and received a score of "acceptable" on it, they were granted transfer rights as incumbents. One of these employees later withdrew his bid leaving five openings to be filled.

Inasmuch as none of the employees from the other units had taken the test, another testing session was arranged. Of those who took the test, seven received a score of "ac-

ceptable." Mr. Locke then investigated the other qualifications of these seven employees and did not find a "significant difference" between the qualifications of the senior employees and the junior employees; therefore, the five employees with the most seniority were selected to fill the vacancies.

The instant grievance was submitted on January 20, 1972. It was denied at the third step on August 29, 1972 and thereafter timely submitted to arbitration.

Prior to the arbitration hearing, the Union asked the Company to provide certain information including a copy of the test. The Company responded by inviting the Union to attend a meeting at which a member of the Company's industrial psychology section discussed various aspects of the test; however, the Company refused to provide a copy of the test. Thereafter, the Union filed a Section 8A(5) charge with the National Labor Relations Board.

At the outset of the hearing, the Union served upon the Arbitrator a formal request to require the Company to furnish the Union a copy of the test. The Company refused to do so on the grounds that to furnish the Union a copy of the test would destroy its future usefulness, it would be in violation of the code of ethics of the American Psychological Association and the conditions under which the tests can be used, and it was not necessary to have copies of the actual test battery to determine its validity and reliability. The Company did furnish, however, sample questions which, while not identical to the actual questions used, were similar. The Company also provided test scores without identifying the individuals.

Following the oral proceedings, the Union, on June 26, 1973, renewed its request for a copy of the test as well as information concerning the scoring. On July 10, 1973, the Company again refused to furnish a copy of the test but did provide the requested information in regard to the

battery weights and scoring. On July 23, 1973, the Arbitrator ruled that to the best of his knowledge he did not have the power to require the furnishing of this information; however, he invited the Union to produce case citations to the contrary. This was not done.

On August 6, 1973, the following letter, written by Mr. Houghton but signed by both Mr. Houghton and Mr. Lewis, was received by the Arbitrator:

> Mr. Lewis and I met in Detroit on July 27 in an effort to resolve certain questions regarding the filing of briefs and your proceeding to render a decision in this matter. Mr. Lewis has agreed that briefs will be filed on or before September 5, 1973, and also that you ought to proceed with a decision in the case both with respect to the disclosure issue, as well as the substantive issue involved in the grievance itself.
>
> Mr. Lewis expressed concern that if you go ahead and render a decision on the disclosure issue, that that will somehow affect his position before the National Labor Relations Board. I advised him that in my opinion with the present case pending before the Board, he need not be concerned about waiving any of his rights. If Mr. Lewis desires, he can always ask the NLRB to review your decision in order to determine whether or not it is consistent with the policies of the Act.
>
> Mr. Lewis' primary concern seems to be this: If you should render a decision in favor of the Company both with respect to the disclosure issue and the substantive issue in the grievance and then the NLRB or a court, as the case might be, should ultimately order the Company to disclose the actual tests themselves, then in that event Mr. Lewis desires to have the opportunity to reopen the arbitration case in order to review his position after he has had a chance to see the

actual tests. Within those limited circumstances; that is, if the Company ever in fact is ordered to disclose the tests and does in fact disclose the actual tests as a result of a final court order, then I would be agreeable to having the arbitrator listen to any additional argument or evidence based upon the disclosure of the tests which might affect his decision with respect to the substantive issue in the grievance. This signed letter will suffice for that purpose.

In view of the fact that ultimate disclosure through a court test would take several months or possibly years, it does not make sense to hold up the arbitration decision for that amount of time. I feel the record is complete in the case before you, and you ought to decide the issues and then let the chips fall where they may with respect to the National Labor Relations Board case. I believe Mr. Lewis is agreeable with this procedure and, if so, he will sign this letter and forward the original to your attention.

The hearing was declared closed on September 18, 1973. At the request of the Arbitrator, the time for submission of his decision was extended.

DISCUSSION:

No useful purpose would be served by setting forth in full the positions of the parties and the extensive arguments in support of those positions. It is sufficient to state that the Company's position is that it has the right to establish minimum, reasonable qualifications for a job, including the attainment of an acceptable score on a reliable and valid test, and that Article VII, Section 13 does not come into play until these qualifications are met. The Union's position is that the contractual mandate requires an examination of all relevant information to determine if an employee is "head and shoulders" above another em-

ployee and that an employee cannot be disqualified on the basis of one item.

At the hearing, the question was raised whether the Arbitrator's decision should be based solely upon the Agreement, or whether he should take into account the Civil Rights Act of 1964, even though racial discrimination is not at issue here, as it affects the use of tests. The Company took the former position. While the Union agreed that the Arbitrator's primary function is to interpret the Agreement, the Union also argued he could not ignore federal law. As noted by the Union, the trial in a suit against the Company and the Union under the Civil Rights Act had just been concluded and the forthcoming decision might well have an impact upon this arbitration. Since the hearing in this arbitration was concluded, a decision in the suit has been rendered. The Arbitrator has carefully reviewed this decision for its possible impact upon this dispute.

The Arbitrator has also reviewed the arbitration cases cited by the parties in support of their positions. He has also studied the entire Lockheed Study cited by the Union including the arbitration cases upon which the conclusions of that study were based. In addition, he has examined the arbitration cases which have been reported since 1968, the date the Lockheed Study was published, in order to be fully cognizant of arbitral reasoning in this area.

(1)

The Union claims that the Company's initial failure to post the bid properly tainted the entire procedure; that is, because Mr. Locke was aware he had a number of bids from other units, he failed to give proper consideration to the Monroe people. This assumes that he would have selected Monroe people even though they had not received an "acceptable" score on the test. There is no evidence to suggest that this would have been the case. Instead it is clear

from the testimony that Mr. Locke had determined prior to the posting that he would not consider an applicant unless he received a score of "accepted" on the test battery. Thus, it seems to the Arbitrator that even if the Notice of Vacancy had been posted properly, the result would have been the same. Moreover, even if the Union's allegation is true, the Union agreed to the procedure that was used.

Related to this argument is the one that Article VIII, Section 38(a) requires the Company to fill the vacancies from among those Monroe unit employees who entered a bid. According to the Union, the phrase " 'if such a vacancy is not filled by a member of the bargaining unit' means generally none have applied." Seemingly, the Union would make an exception if the job required, for example, a chauffeur's license and the bidder was unable to obtain one, but basically the Union's argument is that measurement of employees must be within the unit with a trial period to follow.

There is no doubt that Section 38(a) does give to employees within the bargaining unit preference for promotions—assuming the position has not been filled from within the group—over employees in other bargaining units. The Arbitrator does not believe, however, that Section 38(a) can be given the effect urged by the Union.

This argument goes to one of the basic issues involved in this dispute—does the Company have the right to establish minimum, reasonable qualifications for a job? The Arbitrator believes that the Company does have that right. While Article VII, Section 13 gives weight to seniority "whenever reasonable qualifications and abilities of the employees being considered are not significantly different," it does not, on its face, preclude the establishment of reasonable qualifications to perform the job before the measurement of qualifications and abilities begins. Unless it can be shown that the Union has negotiated a restriction upon

the right of the Company to establish reasonable qualifications, the right of the Company to do so should not be restricted. The testimony adduced at the hearing indicates that the Company has resisted every attempt by the Union to restrict this right.

This holding does not mean, however, that the Company can by-pass employees in a unit who meet the minimum qualifications in the hope of obtaining better qualified employees in other units. It is only when none of the bidders meet the reasonable established qualifications for the job, that the Company can move to the next step of the procedure.

In terms of the above holding, it follows that there was no violation by the Company of Article VIII, Section 38, *if* none of the bidders from the Monroe plant possessed the basic qualifications. By the same token, if this is true, there was also no violation of Article VIII, Section 13 because the Company selected the senior of the qualified bidders from the other units. It is to this question which the Arbitrator now turns.

There is no doubt that the Company has established and maintained the right to use tests as a measure of an employee's qualifications—the Union concedes this point. The Union has, however, raised several questions not only in regard to the use of the test, but in regard to the test itself.

One of the questions raised is whether the Company discriminates by requiring tests for some groups of employees and not for others. As a general observation, the Arbitrator does not believe so. Whether a test will be developed for a particular classification depends in large part upon the training required and the importance of the job. This means that tests will be developed for some classifications before others, and quite likely, tests will not be used for still other groups. There is no question that the Instrument Man job is one of critical importance and requires long training.

While the Union cited instances where the use of tests appeared to be an "on-again, off-again" proposition for certain classifications, this does not mean that the Company has been guilty of discrimination by consistently requiring tests for the Instrument Man classification; there is no evidence as to why this may have occurred in other classifications. It seems to the Arbitrator that the important point is that for over ten years an aptitude test has been consistently required for entrance into the Instrument Man classification and all potential candidates have been required to take it. The only exception appears to be when the Company employs an Instrument Man A from the "outside." Obviously, there would be no point in giving him a test. He is supposed to be fully trained and whether this is true or not can be determined during the probationary period.

A great deal of the testimony and evidence was concerned with the test battery itself. The Union questioned the validity of the test by reference to the type of questions asked. It was to further this line of questioning that the Union desired a copy of the test. But this was simply a questioning of the face validity of the test. Such questions, even if taken from the test itself, prove nothing. Face validity does not prove or disprove the validity of the test in determining the aptitudes necessary for successful job performance. There would be justification in the Union's request if the test were measuring job knowledge.

In support of its argument for disclosure of the test, the United cited *Central Soya Company,* 41 LA 1031. Frankly, the Arbitrator believes this decision was in error if in fact the tests used were standardized aptitude tests of the type here in question. The Arbitrator believes a better precedent is *Wisconsin Electric Power,* 36 LA 4601. In short, the Arbitrator does not believe that the Union's position was damaged in any way by lack of access to the test.

The Arbitrator accepts, therefore, that the test is what the Company claims it to be—a reliable valid test with a

correlation coefficient of .72. There is also no question that it is a "fair test" in the sense that its administration and scoring have been standardized. But even so, this does not answer the question of whether the Company can set a cut-off score and then disqualify an individual from further consideration if he fails to attain it.

There is no doubt that as tests go, this particular test has a high degree of validity. The way in which it was developed and is used also overcomes many of the objections raised by arbitrators and industrial relations practitioners; that is, the test was developed especially for this job (job related), and it has been properly validated.[1] In addition, and very important, the instant test is not used to compare one employee against another in terms of scores attained. (This was an important aspect of the arbitrator's decision in *Central Soya Co.* as well as several other cases reviewed by the Arbitrator, which held that a test could not be the "sole" criterion in promotions.) This problem is eliminated by reporting scores in terms of "not recommended" and "accepted."[2] Moreover, arbitrators have been much more prone in permitting tests to be used for disqualifying employees than permitting them to be used as a criterion for promotion. Indeed, as the Lockheed Study noted, "While tests are not the sole tool for promotion, they are often the sole tool for disqualification."[3] This follows the generally accepted theory that tests are best used in placement decisions.

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[1] Lack of validation was the reason for Arbitrator Anderson's decision in a case cited by the Union, *Containers, Inc.,* 49 LA 589, along with the fact that it was an intelligence test.

[2] It might be noted that of the seven bidders who received "acceptable," the two who were not chosen had scores of 12.7 and 12.6. Three of the five who were selected had scores of 10.4.

[3] For a case expressing this viewpoint, see *Glass Containers Manufacturing Institute,* 47 LA 217.

Nevertheless, tests are not perfect predictors of success—and the Company does not claim otherwise—even when they have high validity as here; they simply increase the probability of successful performance if a certain score is attained. But even when that score is attained there will be people who will not succeed, and there will be people who would have succeeded even though their scores were below the cut-off point. This point is illustrated by the scatter diagram contained in the Company's Exhibit #11.

This diagram makes clear that individuals who score less than 9.2 (or 9.3) have virtually no chance of succeeding. It is also clear that by establishing the cut-off score of 10.3 the accuracy of the prediction is increased—13 of the 16 above average performers scored 10.3 or better while 13, and perhaps 14, of the 17 below average performers scored less than 10.3. But it also increases the number of people who are rejected, some of whom would have succeeded. Thus, between 9.3 and 10.3 there were three who were rated above average and six who were not.

If the cut-off score had been set from 9.0 to 9.3, the Arbitrator would have no difficulty in saying that if an individual did not attain that score he should receive no further consideration; one could then compare the cut-off score, as the Company has done, to having one hand or two, being color blind or not, etc. But that is not the case here. By setting the cut-off score at 10.3, the score which produces the best results in terms of predictability, it does more than eliminate only those who have no chance of succeeding.

The Arbitrator does not believe that the setting of the cut-off score at 10.3 is in itself arbitrary; this has been done for good reason as noted. But the Arbitrator is convinced that the manner in which the test score is applied does border on arbitrary action. There is no doubt—although there were some late protestations to the contrary—

that those individuals who did not attain an "acceptable" score were removed from any further consideration. This seemingly differs from testimony given by the Company in Court as well as testimony by the Company's psychologists concerning the proper use of tests. (See also the two paragraphs under the heading "Conclusions" on page 6 of Company Exhibit #11.) It also differs from the way in which the Company determines whether an employee meets the qualification of "satisfactory attendance;" in attendance cases, if an employee's attendance record is poor based upon certain norms, an investigation is conducted to determine the cause of that poor attendance. The statistics are not accepted at face value.

It seems to the Arbitrator that the same approach should be used here. Based upon the evidence, it is clear that an individual who scores 10.3 is far more likely to succeed than one who does not. It clearly indicates a significant difference between two such employees *unless* there is something in the individual's background which would offset this lower score. In fairness to the senior employee, there should be such an investigation; otherwise seniority is undermined.

The next question is whether any one was harmed by the Company's action. It is impossible for the Arbitrator to make this determination. While the Union argued that the grievants had qualifications which offset their test scores, the Arbitrator is not certain that this is true. Experience in certain work or educational activities may or may not be important; the evidence in this regard was not overwhelming. Certainly, such experience, work or educational, cannot offset scores of below 9.3. In fairness to those grievants who scored between 9.3 and 10.3, however, it seems to the Arbitrator that the parties should review their qualifications to see if they do have qualifications that were not fully considered and that would offset their failure to attain a 10.3 score.

(3)

The Arbitrator notes in conclusion that the impact of the Civil Rights suit upon this particular test is uncertain. To attempt to reach a conclusion based upon the evidence presented is not feasible. While the test appears to meet certain of the guidelines, it is not clear whether it meets others. It seems best, therefore, for the Arbitrator to defer judgment on this matter.

Award

For the reasons set forth above, the Arbitrator finds that the Company did not violate the Agreement by establishing the attainment of an "acceptable" score on the Instrument Man test battery as a general qualification for selection into the Instrument Man B classification. The attainment of such a score creates a presumption of "significant difference" over the failure to attain such a score, unless offset by relevant educational or job experience. The Company is obligated to consider such evidence and cannot disqualify an employee without such consideration. Certain of the grievants, as indicated hereinbefore, shall have their qualifications reviewed to determine if such qualifications offset their failure to attain an "acceptable" score. In the event it is found that any or all of these grievants have the qualifications necessary to offset the "not recommended" score they received on the aptitude test, they shall be promoted into the Instrument Man B classification.

DALLAS L. JONES
Dallas L. Jones
Arbitrator

Dated at: Ann Arbor ,Michigan
December 3, 1973

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Case: 5430 0720 72

Grievance: PMO-123

IN THE MATTER OF ARBITRATION BETWEEN LOCAL 223,
UTILITY WORKERS UNION

—and—

THE DETROIT EDISON COMPANY
DETROIT, MICHIGAN

Preliminary Statement

On December 3, 1973, the undersigned arbitrator, Dallas L. Jones, rendered an Award in the above captioned matter which reads:

> "For the reasons set forth above, the Arbitrator finds that the Company did not violate the Agreement by establishing the attainment of an 'acceptable' score on the Instrument Man test battery as a general qualification for selection into the Instrument Man B classification. The attainment of such a score creates a presumption of 'significant difference' over the failure to attain such a score, unless offset by relevant educational or job experience. The Company is obligated to consider such evidence and cannot disqualify an employee without such consideration. Certain of the grievants, as indicated hereinbefore, shall have their qualifications reviewed to determine if such qualifications offset their failure to attain an 'acceptable' score. In the event it is found that any or all of these grievants have the qualifications necessary to offset the 'not recommended' score they received on the aptitude test, they shall be promoted into the Instrument Man B classification."

Upon receipt of the Award, the Company proceeded to implement it. Subsequently, the Union questioned whether the Company had fully complied with the Award and requested the Arbitrator, through the American Arbitration Association, to reopen the hearing. The American Arbitration Association determined that the Arbitrator had not retained jurisdiction of the matter; therefore, he could not act without a joint stipulation from the parties. Subsequently, the parties entered into such a stipulation after reaching agreement upon the issue to be presented to the Arbitrator.

The hearing was held on July 18, 1974 in Detroit, Michigan. Mr. Douglas McIlroy and Mr. Raymond W. Schleicher served, respectively, as Union and Company advisors to the Arbitrator. A verbatum transcript of the proceedings was made. Mr. Clement J. Lewis, Director of Services, U.W.U.A., appeared for Local 223. Mr. Ralph H. Houghton, Attorney, Fischer, Franklin and Ford, appeared for the Company. Both parties submitted post-hearing briefs.

Opinion

The stipulated issue in this proceeding is:

> "Whether the Detroit Edison Company has properly implemented the Award in accordance with the opinion attached thereto."

BACKGROUND:

Upon receipt of the Arbitrator's Opinion and Award, the Company proceeded to implement it in the following manner. First, the Company reviewed the test scores of those employees at the Monroe Power Plant who had taken the test to identify which of them had scored between 9.3 and 10.3. Three employees had achieved such a score—Michael J. Pratt, Gary D. Longton, and Richard Burger. Mr. Frank E. Agosti, Assistant Superintendent and Equipment Engineer of the Monroe Power Plant, was given responsibility for interviewing these employees to determine if there was anything in their backgrounds which would indicate they had the ability to perform the work of the Instrument Man Classification and thus offset their failure to attain a 10.4 score on the test.

In order to standardize the interviews and to make certain, insofar as possible, that all relevant information was obtained, an interview guide was prepared by Mr. Agosti (Company Exhibit #1). He was assisted in this task by Mr. William L. Roskind, Company Psychologist, and Mr. Lawrence E. Kanous, Company Psychologist and Director of Training. The questions to be asked covered areas of educational achievement and work experience seemingly relevant to the job of Instrument Man (Company Exhibit #1). The interviewee was also permitted to indicate other experience which he believed important and which was not covered by the interviewer.

Mr. Agosti then interviewed each of the three employees. These interviews required from one-half to one hour and took place either in Mr. Agosti's office or on the job. Mr. Agosti took notes during the interview and each employee was permitted to review these notes to determine if they were accurate and complete. Following the interviews, each employee was also permitted to submit substantiating data and/or information in regard to his claims.

After the interviewing process had been completed, Mr. Agosti prepared for each employee a summary of the information obtained (Company Exhibits #2, #3, and #4). Because two of the employees had indicated extensive military training and experience, Mr. Agosti turned to Mr. Kanous for assistance in evaluating this training.[1] Mr.

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[1] Mr. Kanous' qualifications for undertaking this task are: He is a reserve officer (Major) in the United States Air Force assigned to the Training Research Branch of the Air Force Systems

Kanous advised Mr. Agosti that the training received by Mr. Pratt was substantially related to the job of the Instrument Man, whereas the training received by Mr. Longton was not. This advice was based upon a review of the content of the training programs as well as reference to the military comparability manual, which indicates the degree to which military occupations are related to civilian jobs (Company Exhibits #5 and #6).

Upon the basis of this information as well as upon other information which he had obtained, Mr. Agosti concluded that Mr. Pratt's qualifications were such as to offset his failure to obtain a 10.4 score on the test and he should be promoted to the Instrument Man B Classification. Mr. Agosti did not believe, however, that this was true of Mr. Longton and Mr. Burger; therefore, they were denied promotion. The Union immediately protested the Company's action.

DISCUSSION:

(1)

The issue in this dispute, as stipulated by the parties, is a narrow one: "Whether the Detroit Edison Company has properly implemented the Award in accordance with the opinion attached thereto." This stipulation also limits the Arbitrator's authority; his decision must be limited to determining whether the Company did properly implement the Award. The record should reflect, however, two matters raised by the Union at the outset of the hearing and which were a part of the original hearing.

The first matter has to do with the disclosure of the tests and test scores. If the Union prevails in its efforts to force

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Command. In this capacity he has been working with training programs for a long period of time. As the Company's Director of Training, he has had to familiarize himself with and evaluate training programs to assist returning veterans.

disclosure through an unfair labor practice charge against the Company, the Union then has the right to reopen the hearing if it so desires. The letter of agreement between the parties to this effect is set forth in full in the original decision.

The Company, for the purpose of the instant hearing, did disclose the names of those individuals at the Monroe Power Plant who scored between 9.3 and 10.3. The actual score received by each individual was not disclosed; however, this is not of such importance as to preclude a review of the Company's action in implementing the Award. Regardless of the score an individual attained in the range between 9.3 and 10.3, it is, under the terms of the Award, his qualifications other than test score which become of decisional importance.

While there was some confusion at the outset of the hearing as to how many employees at the Monroe Power Plant were entitled to the review ordered by the Arbitrator, this confusion was cleared away by the testimony of Mr. Roskind. The Union also intimated that the qualifications of other employees should have been reviewed, but there was no evidence introduced as to why this should have been done nor were such employees identified.

The second matter concerns whether the test will meet the standards established by the courts and the E.E.O.C. under Title VII of the Civil Rights Act of 1964. The Arbitrator did not attempt to make a conclusive determination of this issue in his Opinion but decided to "defer" it. In retrospect, it is clear that the Arbitrator should have provided more explanation for his decision; however, this explanation was set forth during a discussion at the hearing between the Arbitrator and representatives of the parties. If the test is found to be in violation of the guidelines, the Union will then have, as discussed at the hearing, a basis for further action. It should be noted, however, that the Arbitrator found that the Company had a contractual right

to utilize the test, and both parties agreed this was the Arbitrator's primary concern and responsibility.

(2)

While the Union has raised several objections to the manner in which the Company proceeded in carrying out the Arbitrator's directive as contained in the Award, it is the Arbitrator's belief that the Company's procedure was conceived and, for the most part, carried out in a manner consistent with the Award. This is so for the following reasons:

The Arbitrator's holding that the attainment of a 10.3 score created a "presumption of 'significant difference'" over the failure to attain such a score was based upon the evidence which clearly indicated that there was a very high probability that those who attained such a score could successfully perform the job, whereas this was not true for those who failed to do so. The "presumption" of significant difference arises from this fact; that is, the test separates, with a high degree of confidence, those individuals who have the aptitude necessary to perform the job from those who do not. Thus, when one individual attains a 10.3 score and another fails to do so, it can be tentatively said, under the terms of Article VII, Section 13, that there is a "significant difference" between the "reasonable qualifications" of the two individuals.

While the evidence was clear that an individual who scored below 9.3 had virtually no chance of meeting the demands of the Instrument Man Classification, this was not true for those who scored between 9.3 and 10.3. Although most individuals in this group will not succeed, there are some, if they can be identified, who will succeed if given the chance. The Arbitrator held, therefore, that those individuals who scored between 9.3 and 10.3 should not be rejected without further consideration; instead, their past work and educational experience should be reviewed to

determine if there was evidence to indicate they had the ability to perform the job and thus offset their failure to attain a 10.4 score.

In order to fulfill the Arbitrator's directive, the Company constructed an interview guide (in effect a focussed interview) designed to elicit work and educational experience relevant to the job requirements of the Instrument Man Classification. A review of the interview guide in terms of the requirements of the Instrument Man Classification, as set forth in the job description, results in the conclusion that this purpose was carried out. The areas covered in the interview guide are relevant to the job. While the Union has objected to the extensive probing that this procedure involved, the Comany was clearly under an obligation to obtain full information concerning each of the grievants. A less systematic and extensive approach would have left the Company open to the charge that it had not followed the directive contained in the Arbitrator's Award.

The Union argues next that the background of the grievants had to undergo an extensive investigation not required of those employees who attained a score of 10.3 and that the relevant experience of the grievants was equal to or better than that of many of those who were promoted. The Union also queries the Company's use of military experience in assessing an individual's qualifications.

It would appear that the Union has misconstrued the Arbitrator's Award and the reasoning that went into it. Again, the test very successfully identifies those people who have the *aptitudes* necessary for successful job performance. Irrespective of past work experience, there is a high probability that with proper training those who score 10.4 will develop the *abilities* necessary to successful job performance. A score between 9.3 and 10.3 creates a serious doubt as to whether an individual possesses the necessary aptitudes; if he lacks such aptitudes, he will not be success-

ful in the job regardless of the amount of training he receives.

This is so because training cannot overcome the lack of aptitudes; training can only develop the potential capacities or abilities which the individual possesses. While training should enable an individual to perform better than he could before such training, this does not mean the individual will be a successful performer unless he has the aptitudes to fully utilize such training.

Because a score on the test between 9.3 and 10.3 creates serious doubt that an individual has the necessary *aptitudes* for the job, the only way in which this doubt can be overcome is to examine his work experience and educational achievements to determine if he has the *ability* to perform the job; that is, has he actually displayed the abilities required of the Instrument Man? If such evidence is present, he has overcome the "presumption of a 'significant difference' " created by his failure to attain at least a 10.4 on the test. At this point, he is on a par with the individual who has attained a 10.4 score and other factors become relevant in determining who will be promoted.

The Arbitrator believes that anything in an individual's prior experience which can be helpful in determining whether he has the ability to perform the job should be used, including military experience. This was the clear intent of the Award. While the Arbitrator realizes that one individual may be more fortunate in the opportunities he has had, the Arbitrator does not know of any way to overcome this dilemma.

The final question is whether in reviewing the education and work experience of Mr. Burker and Mr. Longton, the Company acted in an arbitrary or discriminatory manner in failing to promote them. (The action in regard to Mr. Pratt is not at issue because he was promoted.) While the Company urges that the Arbitrator's role is a limited

Pratt is not at issue because he was promoted.) While the Company urges that the Arbitrator's role is a limited

one and he should not substitute his judgment for that of the Company, the Arbitrator does have a clear responsibility to review the qualifications of Mr. Burger and Mr. Longton in terms of the requirements of the job to determine if the Company acted in a logical and reasonable fashion. The Arbitrator takes notice of the fact that he does have some knowledge of the job requirements of the Instrument Man Classification acquired not only through this case but previous cases as well.

The Arbitrator cannot find in Mr. Burger's past experience evidence that he has the necessary abilities to perform the job; indeed, the Union came close to conceding that this was so. His college work in chemistry and algebra represent additional education, but while helpful, they are not essential for the job. More important is the fact that while such courses often, but not always, require the student to develop analytical ability, he was not able to utilize this training in terms of successfully passing the test.

It would seem that he has successfully performed the job of Power Plant Operator, but this does not mean, *per se*, that he can do the work of the Instrument Man Classification. In order to hold that successful performance on one job will lead to successful performance on another job, there must be a showing that the abilities required for one job have relevance to the other job. There is no such evidence here; indeed, the evidence there is indicates that there is little relationship between successful performance as a Power Plant Operator and successful performance as an Instrument Man.[1] The Arbitrator holds, therefore, that the Company's action in refusing to promote Mr. Burger was reasonable.

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[1] The testimony indicates that in the past many who were selected to become Instrument Men were from the Power Plant Operator Classification. Their inability to perform all the requirements of the Instrument Man Classification led to the action in strengthening the selection process.

The assessment of Mr. Longton's qualifications presents a more difficult task. While Mr. Pratt's background experience is clearly superior to that of Mr. Longton as the Company has noted, this is not of importance here. The important question is whether there is sufficient evidence to indicate that Mr. Longton has the ability to perform the Instrument Man job.[1]

It seems to the Arbitrator that there is some evidence that this may be so. While his military experience is not directly relevant to the Instrument Man job,[2] he did have to use some analytical ability and judgment in carrying out his duties. The unrefuted testimony indicates, however, that this analytical ability and judgment was confined to the use of various testing devices to determine if the cable or component was working properly; if not, the cable or component was replaced. While the Instrument Man classification includes work of this nature (see Typical Duty No. 4 of the Job Analysis) and uses some of the same testing devices, it is not the most important work of the classification such as trouble-shooting and repair of equipment.

Much the same can be said of his television repair work; the work which he performed can be termed routine in nature. Although such electronic experience, as well as his course in hydraulics, is experience and information necessary to the Instrument Man job, it does not provide a clear

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[1] A bothersome point in regard to Mr. Agosti's interview with Mr. Longton is that it was conducted on the job and subject to repeated interruption. There is no claim, however, that the information obtained was incomplete or inaccurate.

[2] While the Arbitrator does not question the validity of the comparability manual—he is aware that this was carefully prepared—the review of an individual's qualifications must include not only relevant work experience but must include as well an examination of any type of work experience to determine if the abilities sought were a part of that work experience.

indication that he has the necessary abilities to go beyond this point and carry out the more important functions of the classification. The skills and information possessed by Mr. Longton can be developed or obtained in a relatively short period of time.

The Arbitrator has no intent of denigrating the experience of Mr. Longton. He seemingly utilized the opportunities available to him. However, the problem is that while he may have the abilities necessary to perform all of the duties of the Instrument Man Classification, the evidence is not such as to indicate that he clearly has such abilities. The Arbitrator cannot hold, therefore, that the Company has acted unreasonably in failing to promote the grievant.

Award

The Detroit Edison Company has properly implemented the Award in accordance with the Opinion attached thereto.

DALLAS L. JONES
Dallas L. Jones
Arbitrator

Dated at: Ann Arbor, Michigan
October 22, 1974

EQUAL EMPLOYMENT OPPORTUNITY: EMPLOYMENT TESTING

Following is the text of EEOC's Guidelines on Employee Selection Procedures. The revised regulations, effective August 9, 1970, were republished on November 24, 1976 in response to the Guidelines issued on November 23, 1976 by the Labor Department, the Justice Department and the Civil Service Commission, Despite the new regulations, the EEOC guidelines remain applicable to all employers and others subject to the jurisdiction of EEOC.

Title 29—Labor

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1607—GUIDELINES ON EMPLOYEE PROCEDURES

Republication of Guidelines

Sec.

1607.1 Statement of purpose.
1607.2 "Test" defined.
1607.3 Discrimination defined.
1607.4 Evidence of validity.
1607.5 Minimum standards for validation.
1607.6 Presentation of validity evidence.
1607.7 Use of other validity studies.
1607.8 Assumption of validity.
1607.9 Continued use of tests.
1607.10 Employment agencies and employment services.
1607.11 Disparate treatment.
1607.12 Retesting.
1607.13 Other selection techniques.
1607.14 Affirmative action.

AUTHORITY: The provisions of this Part 1607 issued under Sec. 713, 78 Stat. 265, 42 U.S.C. sec. 2000e-12.

§ 1607.1 STATEMENT OF PURPOSE.

(a) The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.

(b) An examination of charges of discrimination filed with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes protected by title VII may result in the rejection of many who have necessary qualifications for successful work performance.

(c) The guidelines in this part are designed to serve as a workable set of standards for employers, unions and employment agencies in determining whether their selection procedures conform with the obligations contained in title VII of the Civil Rights Act of 1964. Section 703 of title VII places an affirmative obligation upon employers, labor unions, and employment agencies, as defined in section 701 of the Act, not to discriminate because of race, color, religion, sex, or national origin. Subsection (h) of section 703 allows such persons "* * * to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

§ 1607.2 "TEST" DEFINED.

For the purpose of the guidelines in this part, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

§ 1607.3 DISCRIMINATION DEFINED.

The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

§ 1607.4 EVIDENCE OF VALIDITY.

(a) Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate § 1607.3. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance of the jobs in question.

(b) The term "technically feasible" as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

(c) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from more than one company in the same industry. Both in this instance and in the use of data collected throughout a multiunit organization, evidence of validity specific to each unit may not be required: *Provided,* That no significant differences exist between units, jobs, and applicant populations.

§ 1607.5 Minimum standards for validation.

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street NW., Washington, D.C. 20036. Evidence of content or contruct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

(b) although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and/or are not available through normal commercial channels must be included as a part of the validation evidence.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisors' prejudice, as, when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

(5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been

developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. (See § 1607.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups.

(c) in assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available:

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the

test and a criterion of job success for the tests to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

§ 1607.6 Presentation of validity evidence.

The presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. (See § 1607.5(c) concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test of the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

§ 1607.7 Use of other validity studies.

In cases where the validity of a test cannot be determined pursuant to § 1607.4 and § 1607.5 (e.g., the number of

subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity. Any person citing evidence from other validity studies as evidence of test validity for his own jobs must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in paragraphs (a) and (b) of this section.

§ 1607.8 Assumption of validity.

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

§ 1607.9 Continued use of tests.

Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a

specific setting is practicable and required but not yet obtained, the use of the test may continue: *Provided:* (a) The person can cite substantial evidence of validity as described in § 1607.7 (a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

(a) An employment service, including private employment agencies, State employment agencies, and the U.S. Training and Employment Service, as defined in section 701(c), shall not make applicant or employee appraisals or referrals based on the results obtained from any psychological test or other selection standard not validated in accordance with these guidelines.

(b) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in these guidelines. An employment service is not relieved of its obligation herein because the test user did not request such validation or has requested the use of some lesser standard than is provided in these guidelines.

(c) Where an employment agency or service is requested only to administer a testing program which has been elsewhere devised, the employment agency or service shall request evidence of validation, as described in the guidelines in this part, before it administers the testing program and/or makes referral pursuant to the test results. The employment agency must furnish on request such evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or union does not supply satisfactory evidence of validation. Reliance by the test user on the reputation of the test, its author, or the name of the test shall

not be deemed sufficient evidence of validity (see § 1607.8(a)). An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in § 1607.7.

§ 1607.11 Disparate treatment.

The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership oportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

§ 1607.12 Retesting.

Employers, unions, and employment agencies should provide an opportunity for retesting and reconsideration to earlier "failure" candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that individual should be retested.

§ 1607.13 Other selection techniques.

Selection techniques other than tests, as defined in § 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being on the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

§ 1607.14 Affirmative action.

Nothing in these guidelines shall be interpreted as diminishing a person's obligation under both title VII and Executive Order 11246 as amended by Executive Order 11375 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated pursuant to these guidelines does not relieve employers, unions or employment agencies of their obligations to take positive action in affording employment and training to members of classes protected by title VII.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

THE DETROIT EDISON COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The American Psychological Association ("APA"), a non-profit professional organization founded in 1892, is the major association of psychologists in the United States. The purpose of the Association, as set forth in its Bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all its branches in the broadest and most liberal manner."

The Association numbers almost 40,000 and includes the vast majority of psychologists holding doctorate degrees from accredited universities in the United States. Approximately half of the members have a direct interest in

psychological testing — the specific matter at issue in this case. However, because questions of the confidentiality and privilege of the relationship between a psychologist and his client are central to this case, all members of the Association, all other psychologists, and the clients whom they serve, could be directly and adversely affected by the decision of the National Labor Relations Board ("Board") as enforced by the Sixth Circuit.

One of the APA's central functions is to establish ethical standards for the guidance of psychologists. The Association's Code of Ethics, binding on all members, is maintained by a committee on ethics of Amicus. The committee, with the concurrence of the Board of Directors, has the authority to impose sanctions against members who violate the ethical code, including suspension or expulsion from the Association. Further, the APA's code of ethics has been incorporated in the laws of many states, thus governing the professional conduct of many non-member psychologists licensed in those states. In many cases, the state laws refer expressly to the Code of Ethics of Amicus.

The American Psychological Association has a direct interest in this matter, since several principles of its ethical code have been undermined by the decision of the Board as enforced by the Sixth Circuit. The most important are those which adversely affect the welfare of the psychologist's client — confidentiality and client relationship. However, important standards relating to test security have also been undermined by the decision below.

CONSENT OF THE PARTIES

Amicus American Psychological Association is filing this Brief with the consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

QUESTIONS PRESENTED

1. Whether Section 8(a)(5) of the National Labor Relations Act requires an employer to disclose to a union individual employees' raw scores on psychological aptitude tests without their consent, scores which were not furnished to management, when to do so intrudes upon the confidential professional relationship between the employees and the administering psychologists as required by the Code of Ethics of Amicus and incorporated into Michigan law.

2. Whether the decision of the Sixth Circuit enforcing a Board order requiring an employer to give directly to a union, rather than to a qualified psychologist of the union's choosing, copies of validated test batteries and actual test papers, to which management has no access, in violation of the Code of Ethics of the Amicus, as incorporated into Michigan law, ignores the interests of psychologists, future examinees, the employer, and other users of the test batteries, and is in conflict with Title VII of the Civil Rights Act of 1964, the guidelines of the Equal Employment Opportunity Commission on testing, and a decision of the Second Circuit.

STATEMENT OF THE CASE

This matter arises from a decision of the United States Court of Appeals for the Sixth Circuit enforcing an order of the National Labor Relations Board requiring Detroit Edison ("Company") to provide to the Union employees' raw scores and test papers from psychological aptitude tests without their consent, and the actual test battery. Such disclosure by the administering psychologists contravenes the ethical standards of Amicus, standards incorporated in the laws of many states.

The case had its genesis in 1971 when the Company had six positions to fill at one of its facilities. Applicants for the positions had to meet several requirements including a minimum grade of "recommended" on a battery of aptitude tests consisting of two widely used, validated exams. The tests were administered by the Company's Industrial Psychology Division, headed by a member of APA licensed to practice psychology in the State of Michigan. The employees who took the psychological aptitude exams were given verbal and written assurances by the Company psychologists that their actual test scores would be kept in confidence and that only an interpretation of their overall performance would be released. The psychologists' pledges of confidentiality to the employees were honored and only a general evaluation of each applicant's performance was provided to management. To prevent misuse of test results and to protect the applicants from harassment or ridicule, the Company psychologists did not reveal the applicants' raw test scores or release their test papers.

The Union initiated a grievance proceeding when certain applicants were rejected for the positions for failure to obtain the required minimum grade. In the course of the arbitration and Board proceedings which followed, the Company furnished to the Union all of the following data: a written explanation of the tests, sample questions, and the written validation studies of each test. However, the Union also sought each applicant's raw test score and test paper. In an effort to accommodate both the Union and the confidential relationship between the psychologists and tested employees, the Company provided to the Union the raw test scores without, however, linking them to an individual employee's name. The Company also offered to disclose to the Union the raw test scores and actual test papers of any employee who consented to such disclosure; however, the Union refused to seek such consents. Without these consents, the psychologists were professionally obligated to maintain the confidentiality of the testing information.

The Union also demanded copies of the test batteries. Again, in an effort to accommodate the Union and to maintain the security of the tests, as required by the Code of Ethics of Amicus, the Company offered to furnish the test batteries to a qualified professional psychologist of the Union's choosing; the Union also refused this offer.

At the conclusion of the Board proceeding, the Company was ordered to disclose to the Union the raw test scores and actual test papers of the applicants, without their consent, and the battery of tests. The only protection ostensibly provided by the Board to safeguard the information was to order the Union not to copy the tests or to disclose them to past or future examinees. (App., p. 16a.) However, one Member of the Board, who would have required the Company to divulge the test batteries only to a qualified psychologist of the Union's choosing, noted the futility of the Board's restriction:

> "There is no professional obligation on the part of the Union not to publicize the tests or their results. I do not see how this Board can enforce its exhortation not to copy or disclose the tests." (App., p. 17a.)

And more importantly from the perspective of Amicus and the involved psychologists and examinees, the Board's restrictions applied only to the test batteries, not to the confidential test scores of the applicants.

When the Company did not comply with the Board's unnecessarily broad order, the Board sought enforcement in the Sixth Circuit. The appeals court, in a two-to-one decision, affirmed the Board's order forcing disclosure of the confidential information. In disregarding the confidential nature of the relationship between the psychologists and the employees, the majority of the panel concluded that "the principles which underlie the National Labor Relations Act are paramount in this case." (App., p.

8a.) The Court of Appeals held that the Company could not rely on a privilege which was personal to the employees who took the examination. (App., p. 8a.)

However, Judge Weick, in dissent, recognized the confidential and privileged relationship between the administering psychologists and the examinees. He found that:

> "The disclosure of the test papers, as well as the individual scores, would subject the psychologists to the sanctions of disciplinary action which could result in their suspension or even revocation of their licenses by the state of Michigan." (App., p. 9a.)

Judge Weick further noted that the test batteries sought by the Union "were in the custody of qualified psychologists" and that "the disclosure of such papers would violate the Code of Ethics of the American Psychological Association which has been recognized by the statutes of the state of Michigan, Mich. Stat. Ann. §§ 14.677(1)(b)." (App., pp. 8a-9a.) Finally, Judge Weick held that the Board's order constituted a gross abuse of discretion because it recognized only the interests of the Union and failed to consider any of the conflicting interests involved and thus should not be enforced. (App., p. 12a.)

ARGUMENT

This case raises significant issues of confidentiality, privacy, and privilege in the psychologist-client relationship which are yet unresolved by this Court: may a union, in its capacity as bargaining agent, intrude upon an employee's relationship with a company psychologist by demanding total and unrestrained access to confidential test scores and papers developed in the course of that relationship. APA does not question the right of a union to obtain information

necessary to carry out its responsibilities; Amicus does assert that the interests of employees in the confidentiality and privacy of their relationship with the testing psychologist, which have been totally disregarded in this case, deserve protection. Amicus also contends that the interests of psychologists in preserving the confidential nature of the psychologist-client relationship, in accord with the Code of Ethics of APA and the laws of many states, warrant protection similarly denied in this case.

The American Psychological Association respectfully submits that this Court should grant certiorari and hold that the confidential relationship between psychologist and client — in this case employees and the company's industrial psychologists — must be protected from unbridled intrusion by a union in its role as bargaining agent. This Court should also recognize the ethical standards of Amicus, as incorporated in the laws of many states, which require psychologists to safeguard against the unauthorized distribution of testing materials and testing data so that those materials can be used effectively by other psychologists.

I. This Court Should Grant Certiorari to Uphold the Confidentiality of the Psychologist-Client Relationship

(1) The relationship of a psychologist and his client is by its very nature a confidential and privileged one. The fact that the psychologist is retained by a company does not alter the confidentiality of that relationship.[1] The paramount importance of the confidential psychologist-client relationship is manifest in the Code of Ethics of the

[1] *See Tweith v. Duluth, M&I Ry Co.*, 66 F. Supp. 427 (D.C. Minn. 1946).

American Psychological Association and in over twenty states by express statutory incorporation of that Code.[2]

The psychologist in the performance of his professional commitment deals with the details of an individual's life that are of a personal and private nature. In a testing situation, these include an individual's intelligence, attitudes, and psychological aptitudes. The examinee must be assured of the confidentiality of his relationship with the administering psychologist or he may refrain from participating in the psychological testing.

In the industrial context, psychological aptitude examinations are widely used for hiring determinations, initial job placement, and advancement. If the Board's unnecessarily broad order is allowed to stand, individuals may be forced to choose between employment or advancement and the possible ridicule and harassment that may occur when test results are disclosed to persons under no obligation to hold them in confidence. Employees who take company psychological exams should not be placed in such a position when means clearly less intrusive of the confidential psychologist-client relationship are available to the Union to enable it to fulfill its functions.

[2]*See, e.g.*, Ala. Code tit. 46, § 297(37) (Cum. Supp. 1973); Ark. Stat. Ann. § 72-1516 (Repl. Vol. 1957); Del. Code Ann. tit. 24, § 3513(a) (8) (Rev. Vol. 1974); Idaho Code § 54-2305(b) (Cum. Supp. 1975); Ind. Code § 25-33-1-13(a) (8) (Burns 1974); Kan. Stat. Ann. § 74-5308(a), 74-5324(d) (1972); Ky. Rev. Stat. Ann. § 319.081 (1972); Me. Rev. Stat. Ann. tit. 32, § 3816 (Supp. Pam. 1973); Me. Rev. Stat. Ann. tit. 32, § 3837 (Cum. Supp. 1975); Md. Ann. Code Art. 43, § 627 (1957); Mass. Ann. Laws ch. 112, § 119(d) (1975); Mich. Stat. Ann. § 14.677(1) (b) (Cum. Supp. 1975); Minn. Stat. Ann. § 148.95 (Cum. Supp. 1975); Miss. Code Ann. § 73-31-21(a) (1) (1972); Mont. Rev. Code Ann. § 66-3209(1) (d) (Cum. Supp. 1975); N.C. Gen. Stat. § 90-270-15(4) (Repl. Vol. 1975); N.D. Cent. Code § 43-32-27(7) (Supp. 1975); Okla. Stat. Ann. tit. 59, § 1361 (1971); Ore. Rev. Stat. § 675.110(10) (1974); Pa. Stat. Ann. tit. 63, § 1205(2) (Cum. Supp. 1975); S.C. Code Ann. § 56-1543.106 (Cum. Supp. 1975); Utah Code Ann. § 58-25-11(10) (Repl. Vol. 1974).

(2) Because the assurance of confidentiality is such an important aspect of the relationship between the psychologist and his client, the Code of Ethics developed by the Amicus[3] has been designed expressly to insure the maintenance of this confidentiality. The Board's order, as affirmed, directing disclosure of the actual test scores and papers of employees without their consent forces the industrial psychologist to violate the ethical principles designed specifically to protect the client or patient of a professional psychologist from unwanted dissemination of confidential matters.

The Association's ethical standards make it the psychologist's "primary obligation" to safeguard "information about an individual that has been obtained . . . in the course of his teaching, practice, or investigation. . . ." Disclosure of test scores without consent of the examinee, particularly to lay persons, directly contravenes this confidentiality standard.

Further, to protect examinees from misuse of test results, and from ridicule or harassment by their peers as a result of disclosure, the ethical principles of Amicus direct that psychologists release psychological test scores "only to persons who are qualified to interpret and use them properly." The Board's order requiring divulgence of actual test scores to the Union disregards the interests of the employees in keeping their scores from becoming common knowledge among their fellow workers. Since the Company provided the Union with a list of scores unidentified by individual employee name, no showing was or could be made that the Union needs the raw scores and test papers with employee identification.

Finally, the Board's order requires the industrial psychologist to violate a major tenet governing the

[3]American Psychological Association, *Ethical Standards of Psychologists* (1972 ed.).

psychologist's relationship with his client, that of informing a prospective client in advance of important aspects of the potential relationship that might affect the client's decision to enter such a relationship. In the instant case, examinees were given oral and written assurances that their scores would be kept in confidence. The decision of the Court of Appeals would require psychologists to violate this principle and to repudiate the assurances of confidentiality given to the employees.

Because of the wide use of psychological tests in the industrial setting in the United States today, the issues raised by the Court of Appeals' enforcement of the Board's overly broad order, in total contravention of the ethical standards devised to govern the conduct of psychologists, should be reconsidered by this Court. If the Court of Appeals decision is allowed to stand, industrial psychologists throughout the United States will be placed in an ethical quandary in which they will have to decide whether to violate the ethics of their profession designed to protect their clients or to comply with a union's demand for unbridled access to raw test scores and examination papers when less intrusive means are available for a union to fulfill its functions as a bargaining agent.

(3) The ethical standards promulgated by Amicus govern not only the professional conduct of its members but also of many non-member psychologists. At least 20 states have incorporated the Code of Ethics of the Amicus in their licensing laws.[4] If this Court permits enforcement of the Board's order, the Company's psychologists will be forced to violate the licensing laws of the State of Michigan. Under the Michigan licensing statute, all persons certified to practice psychology "are subject to the provisions of the ethical standards promulgated by the Department, which standards shall be comparable to the ethical standards of the

[4]See note 2, *supra* at p. 8.

American Psychological Association." Mich. Stat. Ann. § 14.677(1)(b) (Cum. Supp. 1975). The Michigan law further provides for suspension or revocation of a psychologist's license for dishonorable or unprofessional conduct. Mich. Stat. Ann. § 14.677(10) (6) (Cum.Supp. 1975). Disclosure of test scores in violation of these ethical principles would constitute such unprofessional conduct as contemplated by this statute.

Judge Weick, in his dissent, recognized that the disclosure of the test papers, as well as individual scores, could "subject the psychologist to the sanctions of disciplinary action which could result in their suspension or even revocation of their licenses by the State of Michigan." (App., p. 9a.)

Since so many states have adopted Amicus' ethical standards as part of their licensing laws, with serious consequences for licensed psychologists who breach them, this Court should grant certiorari to reconsider the decision of the Court of Appeals enforcing a Board order which places a psychologist in the position of violating either the ruling of an administrative agency or the licensing statute of the state in which he practices.

(4) Congress and the courts have repeatedly recognized the element of privacy and confidentiality with regard to certain personal, and particularly medical, information. Thus, the Freedom of Information Act, 5 U.S.C. § 552 (1970 & Supp. V 1975), though designed to insure public access to a wide range of government reports and information,[5] exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). Thus, the Court of Appeals for the District of Columbia Circuit has held that exemp-

[5]5 U.S.C. § 552(c); *see Rural Housing Alliance v. United States Dept. of Agr.*, 498 F.2d 73, 76 (D.C. Cir. 1974).

tion six of the FOIA is "designed to protect individuals from public disclosure of intimate details of their lives, whether the disclosure be of personnel files, medical files, or other similar files." *Rural Housing Alliance v. United States Dept. of Agr.*, 498 F.2d 73, 77 (D.C. Cir. 1974).

The Board in this case failed to consider any balance between the Union's need for information and the employees' right to privacy with regard to personal information. The Union's need for test results could have been balanced with the employees' right to privacy by disclosure of the test scores without attribution. The Board's order failed to strike any such balance and should not be enforced.

Similarly, Federal law now prohibits funding to educational agencies or institutions which release personally identifiable information in education records. 20 U.S.C. § 1232g(b) (2) (Supp. V 1975). And in the Professional Standards Review Law, 42 U.S.C. § 1320(c) - 1320(c-19) (Supp. V 1975), Congress designed a system whereby the government could obtain accurate information concerning the costs and use of Medicare and Medicaid programs while still providing a mechanism to insure that medical information about patients would be maintained in a confidential manner. In upholding the constitutionality of this legislation against an attack that the reporting provisions violated patients' right of privacy, a three-judge district court emphasized that its decision was based in large part on the specific statutory provisions which were designed to assure proper confidentiality of patient information. *See Association of American Phys. & Sur. v. Weinberger*, 395 F. Supp. 125, 136-37 (N.D. Ill.), *aff'd*, 423 U.S. 975 (1975).

The decision of the Court of Appeals below, enforcing the Board's order, disregards the increasing recognition being accorded by Congress and the courts to an individual's right to privacy of information of a personal

nature, such as medical information, test results, and similar records. *See Rural Housing Alliance v. United States Dept. of Agr., supra*, 498 F.2d at 77; 5 U.S.C. § 552(b) (6) (1970); 20 U.S.C. § 1232g(b) (2) (Supp. V 1975); 42 U.S.C. § 1320(c) *et seq.* (Supp. V 1975). *Cf. Roe v. Wade*, 410 U.S. 113, *reh. denied*, 410 U.S. 959 (1973); *Doe v. Bolton*, 410 U.S. 179, *reh. denied*, 410 U.S. 959 (1973). Because individuals are required to take psychological tests in so many settings in the United States today, this Court should grant certiorari to hold that the Board's order is an overly broad and unnecessarily intrusive invasion of the employees' right to privacy concerning confidential information.

(5) In ordering a company to provide information to a union, the Board is required to protect each of the conflicting interests involved. *See, e.g., Kroger Co. v. NLRB*, 399 F.2d 455, 457 (6th Cir. 1968). The Board's order in this case took into account only the Union's interests. As Judge Weick noted in dissent, the failure of the Board to consider the interests of the Company, the examinees, and the psychologists, constituted a gross abuse of discretion and should not be enforced. (App., p. 12a.) This Court should grant certiorari and hold that the Board must consider the competing interests of the employees and psychologists in the protection of the confidential and privileged psychologist-client relationship.

II. This Court Should Grant Certiorari and Hold That The Company and Its Psychologists Should Not Be Required to Disclose to the Union The Actual Test Batteries

The Board's unnecessarily broad order as enforced by the Sixth Circuit requires the Company and its psychologists to provide to the Union copies of the actual test batteries in conflict with the Code of Ethics of Amicus, the Guidelines of the Equal Employment Opportunity

Commission on testing, and a recent decision of the Second Circuit.

(1) The Code of Ethics of the Amicus requires psychologists to protect psychological tests from reproduction in ways that would invalidate the test techniques and to deny access to such tests to other than persons with professional interests who will safeguard their use. The Board's order as enforced by the Court of Appeals ignores the interests of psychologists in complying with these professional standards when it requires them to disclose the test batteries to union representatives who are under no obligation to safeguard their security.

The rationale for the ethical principles requiring test security is to prevent standardized tests from becoming invalid through dissemination to future examinees. The test batteries in question, the Minnesota Paper Form Board Test and the Engineering and Physical Aptitude Test, are standardized psychological tests, and thus have been validated and found reliable.[6] Only when a test has been found, through extensive research, to be both valid and reliable, does it meet the Amicus' *Standards for Educational and Psychological Tests* (American Psychological Association, 1974) which have been recognized by the Equal Employment Opportunity Commission in its guidelines on testing. See 29 C.F.R. Part 1607.

The Board's order, as affirmed by the appeals court, forces the psychologist to distribute validated tests to persons under no obligation to secure them from dissemination.

[6]A "validated" test is one in which the final form of the test has been administered to a sufficiently large sample to determine the degree to which it measures that which it purports to measure. A "reliable" test is one in which either the same or an alternate form of the test has been administered more than once to the same examinees and the responses to each found to be similar. *See* American Psychological Association. *Standards for Educational and Psychological Tests* 16 (1974).

Amicus contends that if the decision of the Sixth Circuit is allowed to stand, test publishers will be unwilling in the future to distribute standardized tests to industrial psychologists employed by companies subject to the jurisdiction of the National Labor Relations Board.

Further, Amicus submits that the decision of the Sixth Circuit poses an unwarranted threat to distributors of personnel selection tests and to those persons engaged in the development of such tests. Such a threat to the field of pesonnel testing, through the loss of secure published tests and the inability of test developers to find volunteer subjects willing to take tests without assurance of confidentiality, might well force employers to turn to unreliable and subjective methods of selection, resulting in poor personnel selection practices and in possible violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1970).

(2) The Guidelines of the Equal Employment Opportunity Commission on testing, adopted pursuant to Title VII of the 1964 Civil Rights Act, rely on testing standards developed by Amicus to ensure nondiscrimination in employment practices. The Sixth Circuit opinion, if allowed to stand by this Court, directly undermines the EEOC testing guidelines as based on the testing standards developed by Amicus. Specifically, Section 703(h) of Title VII allows employers to use professionally developed ability tests provided that neither the tests nor their administration is discriminatory. Pursuant to Section 703(h) of Title VII, the EEOC has developed testing guidelines which require that tests be standardized and validated pursuant to testing standards enunciated by APA. *See* 29 C.F.R. § 1607.5 (App., pp. 92a-93a).

The Board's order as affirmed by the Sixth Circuit disregards one of the important APA Standards referenced in the EEOC Guidelines which requires the test user to

share responsibility with the test developer for maintenance of test security. By requiring the Company to turn over the battery of tests to the Union rather than to a professional psychologist of the Union's choosing, the Board's order direclty conflicts with APA testing standards as incorporated in the EEOC Guidelines.

This Court has on at least two occasions held that the EEOC Guidelines are entitled to great deference and has ruled specifically that a company could not use tests not properly validated under APA standards. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, 435 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). If allowed to stand, the Sixth Circuit's decision could result in the dissemination of standardized tests to non-psychologists and their consequent invalidation under APA standards and the EEOC Guidelines. Since the Union's interests clearly can be met by disclosure of the test batteries to a qualified psychologist of the Union's choosing, without creating a conflict with Title VII or the EEOC Guidelines issued pursuant thereto, the Board's overly broad order requiring dissemination of the test batteries to the Union should not be allowed to stand.

(3) The decision of the Sixth Circuit also conflicts with a recent decision of the Second Circuit. *Kirkland v. New York St. Dept. of Correctional Services*, 520 F.2d 420 (2d Cir. 1975). In *Kirkland*, a race discrimination case, the Second Circuit overturned that part of a district court's order requiring defendant to make available for plaintiffs' review a new promotion test. 520 F.2d 427, 431. Addressing the issues of test security and prejudice to future examinees raised by Amicus herein, the Second Circuit held in *Kirkland*:

> "The District Court ordered that the new test prepared by defendants be submitted to the plaintiffs for review. We find this requirement difficult

> to comprehend. Presumably, this examination will be taken by members of the plaintiff class in competition with others. Permitting advance review by plaintiffs would place all others at a competitive disadvantage. If the District Judge is seeking professional assistance from plaintiffs' expert, his order should so provide; and proper steps should be taken to insure confidentiality." 520 F.2d at 427.

The decision of the Sixth Circuit in this case, ordering dissemination of the test battery to lay persons who have no obligation to maintain the security of those tests, is in direct conflict with the Second Circuit's decision in the *Kirkland* case. Though not the traditional conflict wherein two circuit courts of appeal have construed the same statute differently, the Second Circuit's decision in *Kirkland* and the Sixth Circuit's in this case reach opposite conclusions on the question of the extent to which test security must be guarded if psychological tests are not to be rendered invalid through dissemination. This Court should accept certiorari in this case to resolve the conflict over principles governing test security and testing procedures.

CONCLUSION

For these reasons, Amicus American Psychological Association respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF AMICUS CURIAE SUBMITTED BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF AMICUS CURIAE SUBMITTED BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

The Chamber represents its members in a broad spectrum of matters of critical importance to the business community, including participation as an *amicus curiae* in cases before this Court.[1] The instant case is of vital concern to the large number of Chamber members who rely upon testing in selecting or promoting employees — a reliance which enables employers not only to fulfill their obligation under Title VII of the Civil Rights Act of 1964 to ensure an objective selection process, but also to minimize the risk of selecting unqualified personnel to perform jobs vital to an employer's operations.

The value of testing as an objective employee selection device in American industry and government has been con-

[1] *E.g., Buffalo Forge v. Steelworkers*, 428 U.S. 397 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974).

firmed by several comprehensive studies, including surveys conducted by the Personnel Policies Forum in September, 1976 (PPF Survey #114, p. 1 (BNA, 1976) and by the United States Civil Service Commission[2] in December, 1977. The decision below, if allowed to stand, will pose significant, if not insuperable, obstacles to the continuation of the extensive testing program of Chamber members.

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the largest business federation in the United States, with a total membership in excess of 69,000 enterprises and organizations representing businessmen and women throughout the United States. More than 3,700 state and local Chambers of Commerce and trade associations are members.

STATEMENT OF FACTS

The Detroit Edison Company ("the Company") is a public utility engaged in the generation and distribution of electric power in the State of Michigan. Since approximately 1943, the Union[3] has represented various employees of the Company in approximately 28 bargaining units, including a unit composed of operating and maintenance employees in the production department of the Company's Monroe power plant. Since its certification in the Monroe unit on April 1, 1971, the Union has entered

[2]Status of Test Usage in FY 77, Technical Note 77-2, Test Services Section, Personnel Research and Development Center, United States Civil Service Commission (Dec. 1977).

[3]Local 223, Utility Workers Union of America, AFL-CIO (hereafter, "the Union").

into two successive collective bargaining agreements covering the operating and maintenance employees, the second of which was executed on July 3, 1972.

In late 1971, the Company determined to fill six unit positions in the Instrument Man B classification — a job whose duties include the maintenance of instrumentation vital to the plant's operation. Among the posted requirements for the Instrument Man B position was a minimum of "recommended" on a battery of aptitude tests administered by Company-employed psychologists.[4] The ten Monroe employees who bid for the position were rejected[5] because they failed to achieve a "recommended" score on a test battery which was first developed by the Company in 1958, "refined" in 1969-1970, and twice validated by the Company's industrial psychologists.[6]

On January 17, 1972, the Union filed a grievance under the collective bargaining agreement protesting the Company's reliance upon the test results to deny the Monroe bidders promotion to Industrial Man "B".[7] During the initial steps of the grievance procedure, the Union

[4]The other listed qualifications included high school credits for two years of mathematics and one year of science and a satisfactory physical examination and attendance record. The only selection standard challenged by the Union was the aptitude test.

[5]Five of the six positions were filled by the five most senior applicants who did achieve a "recommended" score; the sixth position was taken by an incumbent Instrument Man from another location.

[6]The Instrument Man test battery was revalidated in 1969-1970, at the suggestion of the technical engineers of the Company's power plants. In 1972 the battery was reviewed by an outside consultant, the National Compliance Company ("NCC"), in conjunction with its revalidation studies of 15 additional job test batteries utilized by the Company. It should be specifically noted that the validity of the test has not in the past and is not now in question.

[7]The collective bargaining agreement requires that promotions be based on seniority "whenever reasonable qualifications and abilities of the employees being considered are not significantly different. . . ."

requested the Company to furnish the test scores of the Monroe applicants — a request declined by the Company. While also denying the grievance, the Company offered to confer with the Union "to enhance their understanding of the Company's objectives in the testing area" — an offer which the Union rejected as "completely unacceptable." Accordingly, the Union requested arbitration of the grievance on October 27, 1972.

Thereafter, on March 5, 1973[8] the Union requested for the first time the following information: (1) the actual battery of tests; (2) the method of scoring and the criteria for establishing the "cut-off" score of 10.3; (3) a report on the test validation; and (4) the report of the National Compliance Company. In response to the Union's request, the Company arranged a meeting on April 2 to explain to the Union the entire testing program and procedures. The Company also furnished the Union with the validation studies for the Instrument Man B test battery conducted by both the Company's psychologists and the NCC. The Company declined, however, to provide the Union the test batteries, the actual test papers or the actual test scores of the applicants, as a consequence of which the Union, on April 4, filed with the National Labor Relations Board ("NLRB" or "Board") an unfair labor practice charge, alleging that the refusal to provide the requested information violated the Company's duty to bargain in good faith (Section 8(a)(5)).

While the charge was pending before the NLRB, hearings were conducted before Arbitrator Jones on May 23, 30 and 31. At the outset of the May 23 hearing, the Union requested that the Arbitrator require the Company to supply copies of the test. During the hearing, the Company offered to supply the following information:

[8]All dates hereafter refer to "1973", unless otherwise indicated.

1. Its 1970 validation study.
2. The 1972 NCC report.
3. Explanations of the tests utilized.
4. Representative sample questions.

Also during the hearing, the Company offered to administer the test battery to the Union's representative and to disclose the test scores of employees who did not object to their release — an offer rejected by the Union. Finally, the Company revealed the examinees' test scores without linking them to the applicants' names.

After the close of the original arbitration hearings, the Union — notwithstanding the extensive information provided or offered by the Company — reiterated its request for "the actual tests, scores and weights." By letter dated July 10, the Company, while again declining to furnish either the actual test battery or scores linked to individual names, responded affirmatively and in detail to the Union's request concerning the battery weights and scoring mechanisms. On July 23, Arbitrator Jones ruled that he was not authorized under the contract to compel the Company to furnish the information, although he invited the Union to produce case citations for the contrary proposition — an invitation declined by the Union. Four days later the Union and Company agreed that the Arbitrator should proceed to decide the merits of the grievance without the requested information, subject to the Union's right to reopen the arbitration proceeding "if the Company ever in fact is ordered to . . . disclose the actual tests as a result of a final court order." Accordingly, on December 3, the Arbitrator ruled that the Company did not violate the collective bargaining agreement by establishing an acceptable score on the test battery as a qualification for the Instrument Man B position, but directed the Company to re-examine the three employees with scores between 9.3 and 10.3. Upon re-examination, one employee was promoted to the Instrument Man job; two were again rejected.

PROCEEDINGS BELOW

On the basis of the foregoing, the Board concluded that the Company's failure to furnish the Union with the requested information violated Section 8(a)(5) and (1) of the Act. As remedy therefor, the Board (Member Kennedy, dissenting) ordered the Company to supply the Union with copies of the test battery, the applicants' test papers, and the applicants' test scores linked to individual names. In so ordering, the Board majority rejected the Administrative Law Judge's recommendation that the Company be required to deliver copies of the test battery, including the applicants' actual test papers, only to a "qualified psychologist" selected by the Union.

The Sixth Circuit (Circuit Judge Weick, dissenting) enforced the Board's order, rejecting the Company's contentions that disclosure to the Union could destroy the utility of the tests, require the Company's industrial psychologists to breach their professional ethical code, and invade the privacy of the employees whose test scores the Company is also required to divulge. Subsequently, on November 22, 1977, the Sixth Circuit denied a petition for rehearing filed by the Company. The Company thereupon filed with this Court a Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

A NOVEL QUESTION OF THE INTERPLAY BETWEEN THE NLRA AND TITLE VII IS PRESENTED

It is well settled that the National Labor Relations Act ("NLRA" or "Act") must be construed "in light of the broad national labor policy of which it is a part"[9] — including, of course, the national commitment to eradicate employment discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Simply stated, the National Labor Relations Board ("NLRB") cannot make decisions which have an impact on other employment legislation without carefully accommodating one scheme to another. Indeed, the Board must administer the Act in a manner

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[9] *Emporium Capwell Co. v. Western Addition Commun. Org.*, 420 U.S. 50, 66 (1975). Compare *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) in which this Court cautioned the Board:

> "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

The NLRB itself has elsewhere acknowledged that the NLRA "cannot be administered in a vacuum. The Board must recognize the purposes and policies of other employment legislation, and construe the Act in a manner supportive of the overall statutory scheme." *Alleluia Cushion Co., Inc.*, 221 NLRB 999, 1000 (1975).

supportive of the overall legislative program. *Southern Steamship Co. v. NLRB, supra.*

The decision below, requiring employers to grant unions access to their aptitude tests,[10] will threaten the very ability of companies to use such tests since the tests' security is critical to their usefulness. Obviously if some individuals who ultimately will be taking the test have advance knowledge of the questions, the utility of the test will be destroyed. "The obvious security problem is to avoid having applicants know the test questions in advance. To maintain security, tests not in use should be kept under lock and key . . . Test security also implies a necessity for keeping tests out of the hands of people who are not competent to use them properly."[11]

The latter point is, of course, a critical issue in this case. Rather than order the tests to be delivered to an industrial psychologist chosen by the Union, the Board ordered that the test materials be given to the Union itself. While a psychologist is under professional and ethical obligations not to reveal the tests to non-experts, there is no practical constraint on the union's disclosure. Under the Board's decision, Detroit Edison will have no reasonable assurance that the tests' security will long be maintained — a circumstance which leaves the company little choice but to abandon the use of tests altogether, thus thwarting its efforts to develop objective, nondiscriminatory selection standards which conform to the requirements of Title VII.

[10]In addition, if carried to its logical conclusion, the Sixth Circuit result may also compel employers to disclose to unions supervisory evaluations, hiring interview reports or similar documents which may be considered "tests" under the Equal Employment Opportunity Commission, *Guidelines on Employee Selection Procedures.* 29 C.F.R. §1607.

[11]Guion, R.M. *Personnel Testing,* 1965, p. 504.

Accordingly, in defining the scope of the employer's obligation under Section 8(a)(5) of the Act to furnish information that may assist the union in performing its representative functions, the Board must consider the potential impact of its orders upon implementation of the Congressionally-mandated equality of employment opportunity — a goal which is facilitated by reliance upon properly validated and administered aptitude or ability tests. See, *e.g.*, Section 703(h) of Title VII of the Civil Rights Act,[12] Equal Employment Opportunity Commission ("EEOC") *Guidelines on Employee Selection Procedures,* 29 C.F.R. §1607.1(a) (". . . [P]roperly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies . . . in the development and maintenance of and efficient work force and . . . the utilization and conservation of human resources generally"). See also *Griggs v. Duke Power Co., supra,* 401 U.S. at 433-34; *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 430-31 (1975) (EEOC testing guidelines are entitled to "great deference").

[12]Section 703(h), which expressly authorizes an employer to administer and "act upon the results" of nondiscriminatory, professionally developed ability tests, was a response to *Myart v. Motorola, Inc.* (reproduced in its entirety at 110 Cong. Rec. 5662-64 (March 19, 1964)), a decision by a hearing officer of the Illinois Fair Employment Practices Commission which, in the view of proponents of 703(h), jeoparized the continuance of employer testing programs:

> ". . . [Myart] is highly unreasonable, because if title VII were administered in this fashion, it would mean that an employer would be denied the means of determining the trainability and competence of a prospective employee, or the competence of one who is currently employed and who is being considered for promotion." (Remarks of Senator Tower (R. Tex.) at 110 Cong. Rec. 13, 492 (June 11, 1964)).

See also the exchange between Senators Fulbright (D. Ark) and Ellender (D. La.), printed at 110 Cong. Rec. 9599-9600 (April 29, 1964). In short, the legislative history of Section 703(h) discloses a vital interest in protecting employer reliance upon properly validated tests in determining employment conditions.

Even a cursory analysis of the decisions below reflects a failure to accommodate the policies of the NLRA and Title VII. Thus, Section 8(a)(5) has never previously been construed to require an employer to disclose to unions aptitude tests or test scores achieved by named applicants. In fact, the General Counsel, citing the impact of a disclosure requirement upon the utility of tests, previously refused even to issue a complaint. *International Telephone and Telegraph, Federal Division*, 22-CA-499, 46 LRRM 1387 (1960). Cf. NLRB GC Adm. Rul. No. SR-477, 46 LRRM 1252 (1960) (Company was justified in refusing to comply with union's request for information concerning proposed aptitude tests in light of oral explanation of their purpose). Nor is the Board's construction of Section 8(a)(5) required or even contemplated by *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) which, as detailed below (pp. 11-15), defines the appropriate inquiry of the NLRB under the "good faith" requirement of Section 8(a)(5) in evaluating an employer's refusal to provide requested information. Moreover, as noted above, the significance under Title VII of properly validated and administered tests as a nondiscriminatory, objective determinant of employment conditions can scarcely be disputed. Compare *Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 432-433; *Senter v. General Motors Corporation*, 532 F.2d 511, 529 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976), and cases cited at n.57. Thus, the NLRB should have weighed the importance of employer compliance with the EEOC testing guidelines, which extend far beyond paper and pencil tests, against the importance of union access to information which is of little benefit to the union or its members. The national labor policy in favor of open and good faith bargaining is hardly impaired by maintaining the privacy and confidentiality of the test materials in question. In short, the failure of the Board and Sixth Circuit to evaluate the "good faith" requirement in light of Title VII's policy to promote an objective selection process, of which "job-related" tests are an integral part, alone justifies intervention by this Court.

II

THE DECISION BELOW CONFLICTS WITH *NLRB v. TRUITT*

In *NLRB v. Truitt, supra*, this Court, while concluding that an employer violated Section 8(a)(5) by declining to produce requested financial data to substantiate a claimed inability to afford a wage increase, cautioned:

> "We do not hold . . . that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts [footnote omitted]. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met" (351 U.S. at 153-154).

As underscored by the dissenting Justices, the Board applied a wrong standard in ruling that the employer's failure to supply the requested financial information constituted a *per se* refusal to bargain in good faith. Subsequently, this Court confirmed that under *Truitt* a refusal to supply information is merely *evidence* of bad faith. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 487 (1960). See also *Shell Oil Company v. NLRB*, 457 F.2d 615, 618 (9th Cir. 1972) ("The Board asserts that once information is shown to be relevant to the Union's performance of its role as bargaining representative, this fixes the duty of the Company to produce and any failure to produce is *per se* an unlawful refusal to bargain. However, this is not the law."); *Kroger Co. v. NLRB*, 399 F.2d 455, 457, 458 (6th Cir. 1968) (*Truitt* requires consideration of the "circumstances of the particular case" and a balancing of the

"conflicting" interests at stake). See, generally, Fanning, *The Obligation To Furnish Information During The Contract Term*, 9 Ga. L.Rev. 375, 376 (1975) ("It is important to note that the [*Truitt*] Court was not making a *per se* finding.").[13]

Notwithstanding *Truitt*, the NLRB and court below failed either to consider the "circumstances of the particular case" or to balance the conflicting interests at stake. Indeed, the Company's violation of Section 8(a)(5) flowed automatically from the determination that the requested information was arguably "of value to the Union in fulfilling its responsibility to the employees". The competing interests disregarded below included: (1) the Company's interest in its testing program; (2) the psychologists' interest in maintaining the ethical standards of their profession; and (3) the examinees' interest in privacy. In response to the Company's argument that unauthorized disclosure would invalidate the aptitude tests, the Board, with the approval of the court below, merely "restricted" the *Union* from disclosing their contents to employees — a restriction which dissenting Judge Weick termed "really naive" and which, in addition, conflicts with *Kirkland v. Department of Correctional Services*, 520 F.2d 420 (2nd Cir. 1975) (Nothing in Title VII requires or authorizes an "advance review" by minority applicants of the examination for the position to which they seek promotion). A threshold difficulty with a mere "restriction" is that nothing in the Board's court-enforced *order* requires the Union not to publicize the tests or their results; accordingly, the availability of a contempt sanction, we submit, is at best speculative. Indeed, even assuming the Board's

[13] *NLRB v. Acme Industrial Company*, 385 U.S. 432, 435-36 (1967) confirmed the employer's obligation to furnish the union information "necessary" to the performance of its statutory responsibilities, but did not disturb *Truitt's* rejection of a *per se* analysis of the "good faith" issue.

willingness to initiate contempt proceedings against the Union,[14] the court, we submit, lacks jurisdiction to enter a contempt judgment against a nonparty "whose rights have not been adjudged according to law" *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 ((1945); *Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 436 (1934); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2nd Cir. 1930).[15] However, even if the union were adjudged in contempt for a violation of the "restriction", the Company is denied an adequate remedy since the tests will have been invalidated and revalidation of a test battery requires years and could again be defeated by a recalcitrant union official.

[14] *Amalgamated Utility Wkrs. v. Consolidated Edison Co.*, 309 U.S. 261, 264 (1940), establishes that the Board has exclusive standing to institute contempt proceedings for failure to comply with a court-enforced Board order. Moreover, the institution of contempt proceedings, although dependent upon formal authorization by the Board, may be "short-circuited" by the General Counsel to whom the Board has delegated the discretionary authority to determine whether or not to seek contempt. See, generally, Bartosic and Lanoff, *Escalating the Struggle Against Taft-Hartley Contemnors*, 39 University of Chicago L.Rev. 225, 259-261 (1972). In any event, the Board itself has displayed a reluctance to pursue vigorously the contempt remedy. Bartosic and Lanoff, *supra*, at pp. 256-257. In light of the Board's contempt record, the Company can scarcely anticipate that the Board will authorize — or, indeed, that the General Counsel will even seek — contempt against a party which neither committed an unfair labor practice nor was otherwise on notice that its legal relationships were being adjudicated.

[15] In *Alemite* the court had enjoined Staff's employer from infringing Alemite's patent: after the injunction issued, Staff severed his relationship with his former employer and infringed the patent. In maintaining that Staff was not in contempt of the injunction issued against his former employer, the Second Circuit noted that "it is not the act described which the decree may forbid, but only that act when the defendant does it" (42 F.2d at 833). By the same token, even if the Union could be "enjoined", the injunction would not bind a *former* official, who could publicize the tests with impunity. *Harvey v. Bettis*, 35 F.2d 349, 350 (9th Cir. 1929).

Apart from the jeopardy to the Company's testing program, the Board and court below similarly disregarded the interests of the industrial psychologists and the examinees. Thus, as dissenting Judge Weick noted, the psychologists' disclosure of the aptitude test battery constitutes a violation of their profession's Code of Ethics and exposes the psychologists to disciplinary sanction, including suspension or even revocation of their licenses. For example, the "Standards for Educational and Psychological Tests and Manuals", published by the American Psychological Association ("APA") and recognized by the EEOC testing guidelines, impose upon psychologists who administer tests a responsibility — shared with the test developer or distributor — to maintain test security. In addition, Standard J2 of the APA Standards limits disclosure of test scores to individuals "qualified to interpret them". The Comment to J2 denies "test score" access to "curious peers" — among whom, we submit, may be included the employees represented by the Union.

Finally, the employees who are examined by the Company's psychologists, and with whom they enjoy a confidential and privileged relationship, have an unquestioned interest in privacy which neither the Board nor court below evaluated. Compare *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 168 (D. D.C. 1976) ("The disclosure of information concerning an employee's promotion prospects, lack of promotion prospects, job performance evaluations, and personal preferences and goals, and the reasons, for an employee's termination contained in . . . [affirmative action plans] would constitute a substantial invasion of the companies' employees' personal privacy"). Accord: *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 298 (C.D. Cal. 1974); *Westinghouse Electric Corporation v. Schlesinger*, 392 F. Supp. 1246, 1249-50 (E.D. Va. 1974), aff'd 542 F.2d 1190 (4th Cir. 1976). Apart from a right of privacy granted

under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, Congress has also recognized a privacy interest of students and parents under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232(g), to prevent the release of education records, including grades, test scores or "personally identifiable" information. See also the Rules and Regulations of the Department of Health, Education and Welfare, 45 C.F.R. §99.30. The prohibition against the release of test scores — albeit in an "education", rather than employment, context — reflects a Congressional interest in minimizing perceived invasions of privacy. Indeed, the Board, while generally rejecting a privacy or confidentiality defense to a refusal to furnish requested information,[16] has itself invoked an invasion of employee privacy to resist disclosure of the names and addresses of employees eligible to vote in NLRB elections — information requested under the FOIA by law professors engaged in a NLRB voting study. *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971). In rejecting the Board's privacy defense, the *Getman* court pointed out:

> "[A]lthough a limited number of employees will suffer an invasion of privacy in losing their anonymity and in being asked over the telephone if they would be willing to be interviewed [footnote omitted] in connection with the voting study, the loss of privacy resulting from this particular disclosure should be characterized as relatively minor. . . . The giving of names and addresses is a very much lower degree of disclosure; in them-

[16] *E.g., Aluminum Ore*, 39 NLRB 1286, 1297 (1942); *Electrical Mfg. Co.*, 173 NLRB 878, 880 (1968). Compare, however, *McCulloch Corporation*, 132 NLRB 201, 207 (1961) in which the Board, citing a potential "breach of confidence," sustained the employer's refusal to disclose in negotiations a wage survey of its competitors who had provided the wage data only upon assurances that the information would remain confidential.

> selves a bare name and address give no information about an individual which is embarrassing" (450 F.2d at 674-675).

In contrast, the challenged disclosure of test scores of named applicants is potentially *very* "embarrassing" — an embarrassment which is obviously not justified by a misperceived benefit to the Union from disclosure of the test data.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be granted.

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IN THE

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No. 77-968

DETROIT EDISON COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF PERSONNEL TESTING COUNCIL OF METROPOLITAN WASHINGTON, PERSONNEL TESTING COUNCIL OF SOUTHERN CALIFORNIA, METROPOLITAN NEW YORK ASSOCIATION FOR APPLIED PSYCHOLOGY AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTEREST OF THE *AMICI CURIAE*

The Personnel Testing Council of Metropolitan Washington, the Personnel Testing Council of Southern California, Inc., and the Metropolitan New York Association for Applied Psychology join together as *amici curiae* for this case.

The Personnel Testing Council of Metropolitan Washington is an organization composed of personnel specialists, industrial psychologists, and other professionals interested in improving the quality and fairness of personnel selection procedures and in sharing ideas and training in this area. Membership has grown rapidly and includes practitioners in personnel administration from government agencies and private industry. *The Personnel Testing Council of Southern California* is one of the oldest organizations devoted to personnel testing and selection in the country. Membership consists of personnel and industrial psychologists, personnel specialists and other professionals interested in advocating the use of fair and non-discriminatory employment practices and in encouraging the use of professionally sound selection and testing practices. *The Metropolitan New York Association for Applied Psychology* is an association of psychologists and other professionals interested in the development of applied behavioral sciences. It has functioned for over 25 years and has a large membership in the New York metropolitan area drawn from public and private employers, academic organizations, research organizations and consultants in organization psychology.

These geographically widespread professional personnel, testing and social science research groups have joined together in this brief out of a concern that vital issues affecting employee aptitude testing and personnel selection, which might easily be overlooked or given insufficient attention in a case involving the construction of the National Labor Relations Act (NLRA), receive their due consideration. The *amici* believe that the Supreme Court must balance the requirements of the NLRA on

the one hand, and Title VII of the Civil Rights Act of 1964 on the other, and fashion a result compatible with the purposes of both statutes, and with the importance of self-regulation of professionals which have a continuing impact on the orderly function of society.

SUMMARY OF ARGUMENT

This case calls for the intervention of this Court, to harmonize two major statutes and strike a just balance between them. This case involves more than the construction of the National Labor Relations Act, as the court below seems to think. It raises important issues affecting Title VII of the Civil Rights Act of 1964, as amended, and the Executive Order mandating non-discrimination in employment by government contractors (E. O. 11246, as amended), and it affects effective self-regulation by the psychological profession.

It is perhaps not surprising for an administrative agency (here the NLRB) to decide the case before it on the basis of the single statute (here the NLRA) which it was created to enforce. But the responsibility of the judiciary is broader. It is incumbent upon the courts to weigh carefully all interrelated considerations, so that a decision in a particular case arising under one specific statute will not do violence to other statutory schemes or to other valid public policy considerations. See *Emporium Capwell* v. *WACO*, 420 U. S. 50 (1975); *Volkswagenwerk* v. *Federal Maritime Commission*, 390 U. S. 261, 282 (1968), (Harlan, J. concurring).

The court below overlooked this obligation. It grounded its enforcement of the NLRB order herein solely on a strict reading of the National Labor Relations Act, disregarding the impact of its decision on the effective implementation of Title VII and other civil rights laws. Further, it disregarded the impact of its decisions on the professional practice of industrial psychologists who find themselves required to comply with an NLRB order that forces them to violate professional codes of

responsibility which have been adopted not only by their professional associations but by several states as preconditions to licensing.

This Court should therefore grant the petition for a *writ of certiorari* to reassert this basic aspect of judicial review of administrative orders, and to enable the issues raised herein to be fully briefed and decided.

ARGUMENT

I.

The decision below precludes employers from complying with the requirements of the various civil rights statutes that employee selection devices be job-related.

This court has constantly reaffirmed the requirement that aptitude tests and other employment selection devices must be shown to be job-related in order to survive a challenge to their use under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e, *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), or indeed under a challenge grounded on constitutional standards, *Washington* v. *Davis* 426 U. S. 279 (1976). Most recently this court affirmed without opinion a decision by a three-judge district court that the National Teachers Examination passed constitutional and statutory challenge because it was validated as job-related according to professional standards. *United States* v. *South Carolina*, 46 U. S. Law Week 3452 (January 17, 1978).[1]

Professional standards of validation provide the touchstone for the determination of job-relatedness, under federal

[1] The three-judge court stated that "[t]o the extent that the EEOC guidelines conflict with well-grounded expert opinion and accepted professional standards, they need not be controlling." *United States, et al.* v. *South Carolina*, 15 E.P.D. ¶7920 N.20 (D.S.C. 1977).

law. Thus, in § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), Congress has specifically provided that "it shall not be an unlawful employment practice for an employer to give and to act upon the results of *any professionally developed ability test* provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate. . . ." (Emphasis added.)

Moreover, a pervasive scheme of federal agency regulations utilizes professional standards as the basis for determining job-relatedness. Thus, the guidelines of the Equal Employment Opportunity Commission (EEOC) respecting use of tests or other selection procedures require that evidence of validity must be based upon "studies employing generally accepted procedures . . . such as those described in the Standards for Educational and Psychological Tests and Manuals" published by the American Psychological Association. ("APA Standards") 29 C. F. R. § 1607.5. Similarly, joint regulations of the Labor Department implementing equal employment requirements for government contractors under E. O. 11246, 41 C. F. R. Part 60-3, the Justice Department under its varied responsibility for enforcing equal employment laws, 28 C. F. R. § 50.14, and the Civil Service Commission under its responsibilities with respect to state and federal employment all describe the APA standards as, in the Department of Labor's own words, the "generally accepted professional standards for evaluating standardized tests and other assessment techniques." 41 C. F. R. § 60-3.5(b). And just recently, on December 30, 1977, the EEOC, the Departments of Justice and Labor, and the Civil Service Commission published for comment a proposed revised set of joint testing guidelines, 42 Fed. Reg. 65542 (December 30, 1977), which by their own terms are designed to represent "*professionally acceptable methods*" of the psychological profession for demonstrating job-relatedness of a selection procedure, and which reaffirm the APA standards as "the generally accepted *professional* standard." 42 Fed. Reg. 65542 at § 5(c) (December 30, 1977) (emphasis added). The new proposal

significantly expands upon the existing EEOC guidelines on retesting found at 29 C. F. R. § 1607.12 and provides that test security is a legitimate concern of test users; see § 12 of the new proposal, 42 Fed. Reg. 65546.

Relevant sections of the APA Standards make it clear that the procedure here formulated by the NLRB and enforced by the court below would make proper validation of tests practically impossible for most employers and thus severely hinder the employer who is cognizant of his Title VII obligations from using standardized objective selection procedures. Standard I5 of the APA Standards for Educational and Psychological Tests provides:

> "I5. The test user shares with the test developer or distributor a responsibility for maintaining test security.
>
> Comment: Test security is a problem whenever a lapse in security can result in changing an individual's score without making a change in his true score. For some kinds of tests a lapse of security would not be serious. If one is to be tested for achieved skill, for example, knowing and practicing the test samples might be highly recommended. In many cases, however, *prior knowledge of test items or scoring procedures could destroy validity.* The problem is not simply one of cheating. Security may be compromised where examinees have had much prior experience with a popular test, have been taught specific test items, or have heard a lot about the test." (emphasis added)

AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL & PSYCHOLOGICAL TESTS (hereinafter "APA STANDARDS") 67 (1974).

Similarly, the division of the APA immediately involved with job testing has adopted a set of published principles which

supplement the APA Standards and are aimed directly at personnel selection measures. Those principles provide:

> "13. The psychologist or other test user is responsible for maintaining test security. This means that all reasonable precautions should be taken to safeguard test materials and that decision makers should beware of basing decisions on scores obtained from insecure tests."

APA DIVISION OF INDUSTRIAL-ORGANIZATIONAL PSYCHOLOGY, PRINCIPLES FOR VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES (hereinafter "DIVISION 14 PRINCIPLES") 15 (1975).

It is thus a foursquare violation of professional standards —and hence of the job-relatedness requirements of the law—for tests and test data to be made available to union officials, with no professional safeguards whatsoever. Yet that was what the Board ordered, and the Court below upheld, in this case.[2]

II.

> The requirement that industrial psychologists disclose wholesale, to unskilled lay representatives of employee groups, tests, answer sheets and unanalyzed scores of persons taking the tests, requires them to breach their duty as licensed psychologists and results in a gross invasion of privacy for test takers.

Responsible members of the psychological profession would be the first to admit that some employers have misused employment testing in the past. But the profession itself has taken great efforts to eliminate those abuses, by the design and

[2] Although the NLRB admonished the union not to distribute the tests, the dissents in the NLRB opinion and in the court below make it clear that the admonition was at best hortatory and certainly afforded no enforceable security for the test data.

enforcement of rules of practice. Significant impetus has been given to this effort by the development of equal employment opportunity law, and in particular by the decision of this Court in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). In *Griggs*, the Chief Justice, speaking for a unanimous Court, held:

> "Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force *unless* they are demonstrably a reasonable measure of job performance."
> 401 U. S. 424, 436 (emphasis added).

The APA revision of the APA Standards in 1974, and the issuance of the Division 14 Principles in 1975, were developed in part as a response to this requirement.

Test security, both to ensure the integrity of validation for job-relatedness and to protect the privacy of individuals, is a key element of the guiding professional standards. Thus, the Division 14 Principles emphasize that the feasibility of using tests to predict performance criteria is contingent on the test results remaining confidential, so that they may be compared to job evaluations independently prepared by supervisors:

> "9. The collection of predictor data and collection of criterion measures should be operationally independent. A common example of non-independence is the collection of criterion ratings from supervisors who know the test scores. If a significant validity coefficient is obtained, it may be due either to a valid relationship or to manipulations of ratings to conform to scores. Such ambiguity should be avoided."

DIVISION 14 PRINCIPLES, at 7. This requirement cannot be met if the decision of the court below, releasing the scores to union officers who are not bound by professional standards, is upheld.

The Division 14 Principles further require that:

"C-7. All persons within the organization who have responsibilities related to the use of employment tests and related predictors should be qualified through appropriate training to carryout their responsibilities.

". . . .

"C-10. The psychologist is responsible for clerical accuracy in scoring, checking, coding or recording test results. This principle applies to the psychologist and to an agent to whom he has delegated responsibility. The responsibility cannot be abandoned by purchasing services from an outside scoring service."

DIVISION 14 PRINCIPLES AT 14. These principles create a high standard for industrial and organizational psychologists, which would be violated if the tests, answer sheets, and unanalyzed scores were to be given to union stewards or officers. Further, public confidence that tests provide a fair basis for making employment decisions would be destroyed.

Of equal concern is the threat to the privacy of the individuals who take employment tests with a pledge of confidentiality. A cardinal rule in this area is that test takers be assured that their test results will [redacted] remain confidential and not be released to unauthorized persons. Thus, the Division 14 Principles provide:

"C-8. Psychologists should seek to avoid bias in choosing, administering, and interpreting tests; they should try to avoid even the appearance of discriminatory practice. This is another principle difficult to apply; it goes beyond data analysis. The appearance of bias may interfere with the effective performance of a candidate in the assessment situation. At the very least, a test user can *create an environment that is responsive to the feelings of all candidates, insuring the dignity of persons.*"

DIVISION 14 PRINCIPLES AT 14 (emphasis added). It is difficult to perceive how the dignity of candidates will be preserved if their test scores are disseminated, for comparison against those of their fellow workers or applicants, to persons who are untrained in interpreting test results, and who are not bound to keep the results confidential.[3]

In *Kirkland* v. *Dept. of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), the Second Circuit took care to protect the confidentiality of tests so that future takers would not be prejudiced. It would be an anomaly if protection afforded future test takers were denied to those who take tests under a pledge of confidentiality only to have their scores indiscriminately released.

The issues raised in this case thus create fundamental conflicts as to the proper balance between various statutory requirements and with the societal interest in the positive self-regulation of a learned profession. These questions are of such vital concern that full review and resolution of them by this Court is warranted.

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[3] Consider, for example, the reactions of law school students or applicants if their LSAT and examination grades were routinely distributed to student government officials.

CONCLUSION

For these reasons, the *amici* believe that a writ of certiorari should issue so that the judgment and decision of the Sixth Circuit can be thoroughly reviewed.

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No. 77-968

DETROIT EDISON COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICUS CURIAE*

The American Society for Personnel Administration (ASPA) is the world's largest association of personnel and industrial relations executives, representing nearly 23,000 professionals in business, government, and education dedicated to the furtherance of personnel and industrial relations management. Accordingly, ASPA and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

ASPA is particularly concerned that the enforcement and interpretation of laws and regulations gov-

erning employment be mutually compatible, and that the diverse agencies of government charged with the regulation of the workplace be cognizant of the need to enforce the laws entrusted to them in a rational and consistent manner. ASPA believes that this case presents a classic case of regulatory "tunnel vision," in which the NLRB chose to fashion a remedy for an alleged violation of the NLRA in a manner which would create significant barriers to compliance with Title VII of the Civil Rights Act of 1964, as amended. Further, the cavalier treatment given to the serious effort of the psychological profession to effect a responsible code of practice, prompted in large part by the development of Title VII law, is cause for great concern.

ASPA believes that this case provides the appropriate vehicle for the Supreme Court to articulate an appropriate balance between different laws which impact heavily on the workplace, as well as to establish guidelines for agencies and courts in considering the impact of their decisions on professional self-regulation.

SUMMARY OF ARGUMENT

This case raises in classical form a conflict between two of the major statutes governing employment in the workplace, the National Labor Relations Act and Title VII of the Civil Rights Act of 1964, as amended, and affects employers and employees nationwide. While the case at bar arose under the National Labor Relations Act, the NLRB chose to fashion a remedy for a purported violation of that Act which would render employers' compliance with the mandates of Title VII impossible. The tension thus created between these two equally valid statutory purposes places any

personnel administrator faced with a similar situation in the impossible position of being forced to decide which law will be violated.

While it may be appropriate for an administrative agency to decide issues before it solely on the basis of the single statute it was created to enforce, it is not appropriate for that agency to remedy a violation of its statute in a way that does violence to the equally important mandate of another statute. This is of particular importance when the remedy ordered is not compelled by any statute. When the agency nevertheless decides in this manner, it is the responsibility of the judicial branch to resolve conflicts between statutes and fashion appropriate relief for one statutory violation in such a manner so as to preserve the integrity of the other statute. The court below did not discharge this responsibility. It chose merely to affirm the NLRB's interpretation of the National Labor Relations Act. By so deciding, the court below made compliance with the compelling mandate of Title VII impossible. In such a situation, the Supreme Court must set the proper balance between the two statutes. See *Emporium Capwell* v. *WACO*, 420 U.S. 150 (1975).

Further, the National Labor Relations Board and the court below dismissed, as irrelevant, professional standards developed by the American Psychological Association for personnel test administration and use which have received repeated endorsement by this court and the agencies charged with the enforcement of the various anti-discrimination laws. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); 29 C.F.R. § 1607, 41 C.F.R. Part 60-3. These standards were developed in part as a response to the mandate of Title VII that criteria used in making employment decisions be job-

related so as to remove artificial and discriminatory barriers to employment opportunities, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and represent a concerted effort by the psychological profession to develop standards for effective self-regulation. The policy implemented in the decision below would render these efforts at self-regulation a nullity, and negate a decade of progress in raising the standards of personnel administration.

This case thus raises a clear instance of statutory conflict and public policy concern which this Court should resolve.

ARGUMENT

I. The Decision In The Court Below Will Prevent Employers From Using Tests Or Other Objective Employee Selection Devices. By Rendering Validation Of Selection Procedures Impossible.

This Court has firmly established the purpose of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et. seq.*, to be the achievement of "equality of employment opportunities" and the removal of "barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 430. In response to this mandate, the whole spectrum of personnel activities has come under close scrutiny by the equal employment enforcement agencies and the courts. In particular, the use of tests in employment matters has been a matter of keen interest to this Court. The proper use of tests for employment purposes is clearly favored. Title VII specifically provides that the use of "professionally developed ability tests" is a sanctioned activity as long as the tests are not designed, intended or used to discriminate. 42 U.S.C. § 2000e-2(h). The EEOC states as a matter of policy that "properly validated and standardized em-

ployee selection procedures can *significantly contribute* to the implementation of non-discriminatory personnel policies, as required by Title VII." 29 C.F.R. § 1607.1 (a) (emphasis added). And this Court has given detailed review to the use of tests with respect to their impact on the employment opportunities of the various protected groups. The teaching of this Court in cases arising under Title VII is that the use of tests in making employment decisions is a preferred activity, provided that the tests are validated as job-related in accordance with accepted professional standards. *Albemarle Paper Co.* v. *Moody, supra.* The requirement that tests be validated as job-related applies under constitutional review as well. *Washington* v. *Davis,* 426 U.S. 279 (1976).

The professional standards on which this Court, the Congress and the enforcement agencies rely have been developed under the sponsorship of the American Psychological Asociation ("APA") over a period of years and represent a concerted effort to ensure that tests are properly used and test takers are protected. In accord with the mandates of this Court, personnel administrators have come to rely upon these standards as one method of ensuring that their employment decisions are in compliance with Title VII.

Standards promulgated by the APA, and extensive professional research in this area, clearly establish that test security is a prerequisite to the proper validation of an employee selection device. Standard 15 of the APA as published provides:

> "15. The test user shares with the test developer or distributor a responsibility for maintaining test security.

Comment: Test security is a problem whenever a lapse in security can result in changing an individual's score without making a change in his true score. For some kinds of tests a lapse of security would not be serious. If one is to be tested for achieved skill, for example, knowing and practicing the test samples might be highly recommended. In many cases, however, prior knowledge of test items or scoring procedures could destroy validity. The problem is not simply one of cheating. Security may be compromised where examinees have had much prior experience with a popular test, have been taught specific test items, or have heard a lot about the test."

AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATION & PSYCHOLOGICAL TESTS 67 (1974) (hereinafter "APA STANDARDS").

Standard J2 of the APA Standards states:

"J2. Test scores should ordinarily be reported only to people who are qualified to interpret them. If scores are reported, they should be accompanied by explanations sufficient for the recipient to interpret them correctly.

Comment: There are difficult problems associated with the question of who should have access to test scores within an organization. Certainly, curious peers should not have access to them. An individual who must make the ultimate decision to admit or to reject or to hire or to reject, or to certify or not to certify, must have the interpretation. One useful (and unanswered) question is whether such a person who lacks the training necesary for the interpretation of scores should be given that training or should be given only the interpretations of scores." *Id.* at 68.

Supplementing the APA Standards, the Division of Industrial-Organizational Psychology of the APA

(Division 14) has published a set of principles described as the "official statement of the Division concerning procedures for validation research, personnel selection, and promotion."

That Division's Principle C-13 provides:

"The psychologist or other test user is responsible for maintaining test security. This means that all reasonable precautions should be taken to safeguard test materials and that decision makers should beware of basing decisions on scores obtained from insecure tests."

APA DIVISION OF INDUSTRIAL-ORGANIZATIONAL PSYCHOLOGY, PRINCIPLES FOR VALIDATION AND USE OF PERSONNEL SELECTION PROCEDURES (hereinafter "DIVISION 14 PRINCIPLES") 15 (1975).

Under these judicially recognized professional standards, tests disclosed to laymen in the manner ordered by the NLRB and the court below could not be validated as job-related under the requirements of equal opportunity law.

This Court has clearly enunciated a rule that the statutory mandates of the National Labor Relations Act cannot be disregarded even by employees who are protesting unlawful racial discrimination. *Emporium Capwell* v. *WACO, supra.* And lower courts which have been faced with the need to reconcile the two statutes have devised approaches that are compatible with both the NLRA and Title VII. *Meyers* v. *Gilman Paper Co.*, 544 F.2d 837 (5th Cir. 1977). The failure of the NLRB and the court below to follow this practice disregards national policy requiring the use of job-related criteria in the equal employment context, and should be reviewed by this Court.

II. The Decision Of The Court Below To Release Tests, Answer Sheets, Unanalyzed Test Scores And The Identity Of Test Takers Shows A Clear Disregard Of The Rights Of Test Takers And Of Professional Ethical Standards.

The court below noted that the Detroit Edison employees who took the test in question did so under a pledge of confidentiality given by the Detroit Edison psychologists. *NLRB* v. *Detroit Edison Co.*, 560 F.2d 722 (6th Cir. 1977). Such a pledge of confidentiality is the standard and preferred practice in the field of employment testing.[1] The ethical standards of psychologists, promulgated by the APA emphasize strongly the duty of psychologists to keep test data confidential in order to protect the privacy of the test takers:

> "PRINCIPLE 5. CONFIDENTIALITY. Safeguarding information about an individual that has been obtained by the psychologist in the course of his teaching, practice, or investigation is a primary obligation of the psychologist. Such information is not communicated to others unless certain important conditions are not met.
>
> (a). Information received in confidence is revealed only after most careful deliberation and

[1] One of the leading authorities in the field of employment testing —a former President of the APA—describes the obligation of psychologists in the following manner:

> "When tests are administered in an institutional context, as in a school system, court, or employment setting, the individual should be informed at the time of testing regarding the purpose of the test, how the results will be used, and their availability to institutional personnel who have a legitimate need for them. Under these conditions, no further permission is required at the time results are made available within the institution. A different situation exists when test results are requested by outsiders, as when a prospective employer or a college requests test results from a school system. In these instances, individual consent for release of the data is required." A. ANASTASI, PSYCHOLOGICAL TESTING 53-54 (4th ed. 1976).

> when there is clear and imminent danger to an individual or to society, and then only to appropriate professional workers or public authorities.
>
> (b). Information obtained in clinical or consulting relationships, or evaluative data concerning children, students, employees, and others are discussed only for professional purposes and only with persons clearly concerned with the case. Written and oral reports should present only data germane to the purposes of the evaluation and every effort should be made to avoid undue invasion of privacy."
>
> AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL STANDARDS OF PSYCHOLOGISTS 4 (1977 Revision).

The disclosure of the identity of the persons who took the Detroit Edison test and their test scores thus not only results in the destruction of the usefulness of the test and prevents its validation (see discussion I, *supra*), but also violates the professional standards designed to protect the integrity and privacy of the test taker. Contrast the action of the Second Circuit in preserving the confidentiality of a test in order to protect future test takers from unfair competition. *Kirkland* v. *Department of Correctional Services,* 520 F.2d 420 (2nd. Cir. 1975). Here, the potential for abuse goes far beyond that faced by the *Kirkland* court, for the employees who took the test under a pledge of confidentiality will have their unanalyzed test scores released to union stewards and officials. The court below summarily dismissed this concern on the theory that nothing can stand as a barrier to the right of a collective bargaining representative to get any information it wishes about employees in order to carry out its duties. But such breach of the pledge of confidentiality given to innocent test takers is not compelled

by any statute or legislative scheme to promote collective bargaining, and cuts sharply against the compelling public policy of protecting an individual's privacy. It finds no support in the concept of exclusivity of union representation. This Court has established a requirement that every regulatory agency "act with a discriminating awareness of the consequences of its action." *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 174 (1962). The NLRB and the court below neglected this obligation.

In these circumstances, the Court should grant the petition for a writ of certiorari in order fully to address the complex issues ignored by the NLRB and the court below.

CONCLUSION

For these reasons, *Amicus* American Society for Personnel Administration submits that a *writ of certiorari* should issue so that this Court will be able to review thoroughly the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Attorneys for American Society
for Personnel Administration
as *Amicus Curiae*

Of Counsel:

BREED, ABBOTT & MORGAN

Supreme Court, U. S.
FILED
JUN 10 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 4, 1978

CERTIORARI GRANTED MARCH 27, 1978

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Docket Entries

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case No. 7-CA-10276(2)

THE DETROIT EDISON COMPANY, *Respondent*

and

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, AFL-CIO,
Charging Party

4.4.74	Charge filed
8.8.74	Complaint and Notice of Hearing, dated
8.16.74	Answer of Respondent the Detroit Edison Company, dated
9.17.74	Order Denying Request for Postponement, dated
9.23.74	Hearing opened
9.23.74	Hearing closed
1.29.75	Administrative Law Judge's Decision, dated
2.21.75	Respondent's Exceptions To Administrative Law Judge's Decision, dated
6.30.75	Board's Decision and Order, dated
7.18.75	Respondent's Request For Reconsideration, dated
7.24.75	Order Denying Motion, dated
8.10.77	Decision of the Court of Appeals, dated
10.27.77	Petition for Rehearing, filed
11.22.77	Denial of Petition for Rehearing, dated

The following judgments and opinions are located at the following places in the Appendix to the petitioner's petition for a writ of certiorari:

a. Decision dated August 10, 1977, by the Sixth Circuit Court of Appeals, App., p. 1a-12a.

b. Denial of petition for rehearing by Sixth Circuit dated November 22, 1977. App., p. 13a.

c. Decision of NLRB dated June 30, 1975. App., p. 14a-17a.

d. Decision of Administrative Law Judge dated January 29, 1975. App., p. 18a-59a.

e. Arbitration opinion and award dated December 3, 1973. App., p. 60a-76a.

f. Arbitration opinion and award dated October 23, 1974. App., p. 77a-87a.

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

Case No. 7-CA-10276(2)

In the Matter of:
THE DETROIT EDISON COMPANY, *Respondent*

and

LOCAL 223, UTILITY WORKERS UNION OF AMERICA, AFL-CIO,
Charging Party

418 Book Building
Detroit, Michigan
Monday, September 23, 1974

Pursuant to notice, the above-entitled matter came on for hearing at 10:30 o'clock a.m.

BEFORE:

Honorable SIDNEY J. BARBAN, Administrative Law Judge

APPEARANCES:

MR. JOHN A. CIARAMITARO, National Labor Relations Board, Seventh Region, 500 Book Building, Detroit, Michigan 48226; appearing as Counsel for the General Counsel.

MR. RALPH H. HOUGHTON, JR., Fischer, Franklin and Ford, 1700 Guardian Building, Detroit, Michigan 48226; appearing on behalf of the Respondent.

[2] APPEARANCES (Continued):

MR. CLEMENT J. LEWIS, Utility Workers Union of America, AFL-CIO, Suite 605, 815 16th St., N.W., Washington, D.C., 20006; appearing on behalf of the Charging Party.

[3]

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• • •

[6] MR. HOUGHTON: Your honor, as you have probably noted in a brief perusal of the formal documents, the case involves an issue as to whether or not the Edison Company has violated the Act by refusing to disclose certain information to the union, regarding psychological aptitude testing.

I think most of the facts in this case will be agreed to and I don't see any dispute in that area. We'll be looking primarily at the issue and whether or not the union in this particular has a justification for receiving this information.

Without detailing all of the facts, I would like to just review the three points or pieces of information I think the union desires to obtain, and advise you as to the company's position.

The job that we're talking about here is an instrument man job in the powerplant. A psychological aptitude test battery, consisting of two tests, was used in conjunction with selecting applicants to fill vacancies in the instrument man job. In order to be considered and fill that job, you must have received an acceptable score on the psychological aptitude test battery. The test itself consists of two tests—that is the battery consists of two tests—the EPSAT and the Minnesota [7] Form Board test, two psychological aptitude tests that were given to all the applicants.

The union has requested basically two pieces of information. They have asked that the company turn over the tests themselves, the actual tests that are used. The company has declined to do that.

The company has provided the union with various sample types of questions that are found on these tests, but has taken the position that the tests themselves are confidential. And secondly, to disclose them to the public, would infringe upon the future validity of the tests as they are used in future testing programs.

The company has offered to do two things to appease the union in this case. One, our position is we would be willing to disclose these tests to a qualified industrial psychologist for his perusal, for a determination on behalf of the union. We have also indicated to Mr. Lewis, the spokesman for the union, that we would permit him to take the test himself. But we feel we cannot, in fairness to the validity of the tests and our position, disclose the actual test itself.

Two other pieces of information the union desires are the answers, that is what we would think of as the answer

sheets for individuals that have taken the test, and also the actual scores obtained by individual employees.

We have declined to disclose those pieces of information [8] unless we have the employee's consent. We have agreed to furnish all that information to the union with the employee's consent. Our position, again, has been that when the employees took the test they were advised that the results of their scores would be kept confidential unless the employee agreed to have them released. If the employee agrees to have them released, we have no objection to furnishing that information to the union.

Now, it's within this framework that we confine ourselves here today, before you, on the central issue, and that is whether or not the company should be required to disclose the actual tests themselves to the union. Thank you.

• • •

[12] CLEM LEWIS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

JUDGE BARBAN: Be seated, please.

Q. (By Mr. Ciaramitaro) Mr. Lewis, would you state your full name and address for the record? A. My name is Clem Lewis, my address is 815 16th Street, N.W., Room 605, Washington, D.C. 20006.

Q. Mr. Lewis, by whom are you presently employed? A. I work for the Utility Workers Union of America, AFL-CIO.

Q. And how long have you been employed by Utility Workers? A. More than twenty-five years.

Q. What is your current position with the Utility Workers Union? A. My title is Director of Services for the National Union.

Q. And how long have you had that position? A. Since 1970.

Q. And could you very briefly describe what your duties are as director of services? A. Yes, I'm in charge of research, education, arbitration [13] services, aids to negotiations to our various unions throughout the country, and matters of that kind.

Q. Now I direct your attention to January of 1972. Did your union have a then current collective bargaining agreement with Detroit Edison Company, covering its Monroe Powerplant? A. We did.

Q. I show you what has been marked for identification as General Counsel's Exhibit 2 and ask you whether or not that's the agreement to which you have referred?

(The document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

A. This is the agreement.

MR. CIARAMITARO: I now move its introduction into evidence.

MR. HOUGHTON: No objection.

JUDGE BARBAN: Hearing no objections, General Counsel's Exhibit No. 2 is received.

(The document heretofore marked as General Counsel's Exhibit No. 2 for identification was thereupon received in evidence.)

Q. (By Mr. Ciaramitaro) Now, Mr. Lewis, does that contract contain what can be referred to as a criteria for promotion clause? A. It does.

Q. Is that clause Article Eight, Section thirty-eight? A. Yes. There are two clauses on promotions, but the one [14] you refer to is correct. A-thirty eight, and there is another one called Seven Article VII, 13, on page thirty.

Q. Okay, thank you, Mr. Lewis. Now directing your attention to January 13, 1972, a grievance referred to as PMO 123, did it arise under that contract? A. Yes, it did.

Q. Have you seen a copy of that grievance? A. Yes, I did.

(The document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

Q. I show you what has been marked for identification as General Counsel's Exhibit No. 3 and ask you is that what —the document you just referred to? A. Yes, this is a copy of it.

MR. CIARAMITARO: Your honor, I now move that it be introduced into evidence, except for the handwritten writing at the bottom of that page, which reads: "Not anyone, rec, r-e-c-, with a vertical line". And then the "Mr. Wiley, old test. Did they". That is not offered. Just offering for the basic grievance itself.

MR. HOUGHTON: We have no objection, with the understanding as counsel discussed before on the record, that we will introduce the entire grievance procedure and arbitration.

JUDGE BARBAN: Hearing no objection to General Counsel's Exhibit No. 3, it is received.

[15] (The document heretofore marked as General Counsel's Exhibit No. 3 for identification was thereupon received in evidence.)

Q. (By Mr. Ciaramitaro) Now, Mr. Lewis, was that grievance, to your knowledge, processed beyond just the filing of that grievance? A. Yes, it was.

Q. Did you, yourself, become involved in the processing of that grievance? A. Yes, I did.

Q. Did you get involved in the early stages or the later stages of the process? A. The latter stages.

• • •

[16] Q. (By Mr. Ciaramitaro) Referring to the grievance PMO-123, did that grievance ever go to arbitration? A. Yes, it did.

Q. And was an arbitration hearing held? A. Yes sir, it was.

Q. Do you recall the dates on which that arbitration hearing was held? A. It took several dates.

Q. So that you might not have to refer to your notes, may we propose a stipulation, Mr. Houghton, that the arbitration hearing was held on the following dates:

MR. HOUGHTON: Yes.

MR. CIARAMITARO: May 23, May 24, May 30 and May 31, all in the calendar year of 1973.

MR. HOUGHTON: That's correct, with the additional understanding of the continuation of the hearing, which was conducted on July 18, 1974.

MR. CIARAMITARO: Yes, with that understanding.

MR. HOUGHTON: Certainly, I so stipulate.

Q. (By Mr. Ciaramitaro) Mr. Lewis, prior to that arbitration hearing, did you, on behalf of your union, make any request of the Detroit Edison Company for information in relationship to [17] that PMO-123 grievance? A. Yes, I did.

Q. Were these requests for information made in writing? A. Yes, they were.

Q. Were they also made verbally? A. Yes, they were.

Q. These written and verbal requests were made at different times, is that right? A. Yes, sir, several times.

Q. Now the first request for information that was made, was that made in writing or was that verbally? Do you recall? A. In writing.

Q. Now, Mr. Lewis, I show you a letter dated March 5, 1973, which is marked for identification as General Counsel's Exhibit No. 4. Is that the letter that you refer to as your first written request?

(The document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

A. Yes, this is my first written request.

Q. First request of any sort, written or verbal, is that right? A. That's correct.

MR. CIARAMITARO: I now offer into evidence, except for the language, the written language at the top, the word "copy", which is circled.

[18] MR. HOUGHTON: No objection.

JUDGE BARBAN: Hearing no objection, General Counsel's 4 is received.

(The document heretofore marked as General Counsel's Exhibit No. 4 for identification was thereupon received in evidence.)

Q. (By Mr. Ciaramitaro) Now after you made that written request, Mr. Lewis, did you receive any written replies to that request? Referring to a written reply. A. Written reply—yes, I guess I was asked to come to a meeting at the Detroit Edison office and meet with the director of union relations and the company counsel to see if we could come to a meeting of the minds or something.

Q. Now I'm not asking about, are you saying that the letter to which you've referred asked you to come to some meeting? A. Yes, I believe it did.

Q. Is that what you indicated? A. I'm trying to recollect exactly.

Q. I show you, Mr. Lewis, what has been marked for identification as General Counsel's Exhibit No. 5. It's a letter dated March 15, 1973. Is this the reply letter to which you've just referred?

(The document above referred to was marked General Counsel's Exhibit No. 5 for identification.)

A. May I see my request?

[19] Q. Your March fifth letter, I show you GC-4. A. Yes.

Q. I now move its introduction into evidence.

MR. HOUGHTON: No. objection.

MR. CIARAMITARO: I'd also like it to be noted that the letter is a letter going from Mr. Houghton, himself, to Mr. Lewis.

Q. (By Mr. Ciaramitaro) Now, Mr. Lewis——

JUDGE BARBAN: Just a moment. General Counsel's Exhibit No. 5 is received.

(The document heretofore marked as General Counsel's Exhibit No. 5 for identification was thereupon received in evidence.)

JUDGE BARBAN: Go ahead.

Q. (By Mr. Ciaramitaro) Now, Mr. Lewis, the letter, in its first paragraph, refers to a telephone conversation from March thirteenth, is that right? A. Yes.

Q. Is that what you recall, can you relate—that was a telephone conversation with Mr. Houghton, is that right? A. Right.

Q. Now, could you relate that conversation as best you recall? A. Well, I think he made it quite clear to me that that company couldn't give me the actual tests, test batteries and the scores for each of the individual candidates, and things like that, for the reasons given in his opening statement—[20] confidentiality and other things. But that if I could come over to the office, maybe something could be worked out. And he says, as long as you're going to be here on this date, we'll meet on this date, or some such thing as that.

Q. Okay, that was basically the essence of your telephone conversation? A. Right.

Q. Then this letter followed? A. Right.

Q. And the letter refers to arranging a meeting for Monday, April 2, 1973. Was the meeting, in fact, held on April 2, 1973? A. Yes, it was.

Q. Where was that meeting held? A. At the Detroit Edison offices right here in Detroit.

Q. Do you recall what time of day that meeting was held? A. I believe it was two o'clock, on time.

Q. And were persons representing both the company and the union in attendance at this meeting? A. Just myself for the union and the company had a couple of people there.

Q. Do you recall who they were? A. Yes, I think Mr. Houghton was there. I believe Mr. Roskind, who's sitting here; and the director of union relations, Mr. Ruch. I'm not sure about Mr. Roskind, he might have been, he might not.

[21] Q. Now, as best you can recall, can you relate what happened, what was said by whom, at that meeting? A. Yes. Again, the company restated its position that they could not give me the actual test batteries, they couldn't give me the individual scores, they couldn't give me individual's names attached to individual scores, they couldn't give me the actual tests. But they did give me a sort of a study or validation or what you might call a justification for the type of tests that they were using for these instrument people. And it was a sort of a survey they'd made or it was a report they got from a consultant, I believe, from somewhere else, which kind or justified the type of test they were using.

Q. So they gave you some things, is that right? A. Yes.

Q. Did they give you any of those items that you had requested? A. No.

MR. HOUGHTON: Excuse me, are you referring, by request, to the request of March?

THE WITNESS: I believe I asked for something about validation in that letter, and the report by the National Compliance Company, is that what you mean?

MR. CIARAMITARO: You mean that report?

THE WITNESS: Let me—they gave me nothing for the individuals, nothing for the actual test batteries, nothing for grading, no scoring. They gave me a report by the, I believe [22] was the National Compliance Company. And they gave me some kind of a survey they had made of their own psychologist, sort of justifying the type of test they were using. Now whether that was a strict validation or not, I don't believe it was. I think it was a study they had done by themselves. They were updating the test they were using for instrument man or some such thing.

Q. (By Mr. Ciaramitaro) So it may have partially complied with you request? A. All right, yes.

Q. We stipulated to the various dates of the arbitration meetings, the last one being May 31, 1973. After that arbitration hearing closed, were there other times when you reiterated your requests for information concerning the grievance PMO-123? A. Yes, several times.

Q. And did those take the form of written requests? A. At the outset of the arbitration, the first morning of the arbitration, I served on the arbitrator a request that he order the tests or subpena the tests or whatever he could do, and subpena these scores so that I would be in a better position to argue this case.

Q. That written request, did you give the company representatives at the arbitration hearings a copy of that request? A. I did.

Q. And did the company representatives at that hearing take [23] any position with respect to your request? A. The same position they had previously taken, that they could not involve the actual tests and the actual scores. They could put names alongside of specific scores. And they went through the same argument about this was a test done

by their psychologist and they were going to use it and so forth.

Q. Were you present during all the days of the arbitration hearings? A. Yes, I was.

Q. To your recollection, were the actual tests that you were seeking, were they ever even given just to the arbitrator? A. No, they were not.

Q. The test papers that you were seeking, were they ever just given to the arbitrator? A. No, they were not.

Q. The test scores by each individual named, to your knowledge, were they ever given to the arbitrator? A. No, they were not.

Q. Not even the arbitrator got that information? A. That's correct.

Q. Did the arbitrator ever direct the production of those items? A. No. He gave some opinions.

Q. I'm not asking you about his opinions, I'm asking you were they ever directed. [24] A. He answered that he didn't think, under state law, state arbitration law, I take it, that he could compel the company to supply the information. So he could not meet with my request to order the tests, and order the scores or subpena the tests or subpena the scores or whatever, he did not have the authority in the state law.

MR. HOUGHTON: Excuse me for interrupting, counsel, just to keep the chronology straight, could we introduce a copy of that written request?

MR. CIARAMITARO: May twenty-third?

MR. HOUGHTON: Yes.

MR. CIARAMITARO: Do you have copies?

MR. HOUGHTON: Yes, I do.

(The document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

Q. (By Mr. Ciaramitaro) I guess we can stipulate. Mr. Lewis, I show you what's been marked for identification as General Counsel's Exhibit No. 6. And is this the written request to the arbitrator to which you just referred? A. That is correct.

MR. CIARAMITARO: I now move its introduction into evidence.

MR. HOUGHTON: No objection.

JUDGE BARBAN: General Counsel's Exhibit 6 is received.

(The document heretofore marked as General Counsel's Exhibit No. 6 for identification was thereupon received in evidence.)

[25] Q. (By Mr. Ciaramitaro) I believe you indicated that after the hearing closed, the arbitration hearing, even after, you made written requests of the company for this information, is that right? A. After the arbitration closed?

Q. After May 31, 1973, or requests that referred to your prior requests? A. Yes. After the arbitration had closed, the arbitrator asked the parties to submit briefs. This is usual in most cases. And we then got into a number of situations where I said, now I don't know how to proceed on the case before the Labor Board, asking for disclosure, and if I got that disclosure my brief would be one way. If I didn't get that disclosure, my brief might have to be another way. So we had to write ground rules, if you please, on how we would write the briefs. I wanted to protect my interests at the Labor Board. So the Labor Board hadn't acted on this case too quickly. I took about a whole year, but finally Mr. Houghton, who's here, and myself, he was the advocate for the company and I was the advocate for the union at the arbitration—we got down to some general ground rules on the writing of the briefs and among the ground rules was that—look, if you've got disclosure from the Labor Board and this type of disclosure is such that it

gives you new argument or new food for argument, the case can be entirely reopened. That was a stipulation we arrived at when we submitted our briefs [26] to the arbitrator. But we kept arguing this case about disclosure all the way through, yes.

MR. CIARAMITARO: Your honor, I think I may be able to very quickly go over these things via the offer into evidence the various stipulated documents which are basically letters and the written agreements to which Mr. Lewis has just referred.

Your honor, I think I am now prepared to propose a stipulation—stipulate the introduction of various documents. And they are as follows:

Stipulated exhibit GC-7 is a letter dated June 2, 1973, from Mr. Lewis to Mr. Houghton. I'm offering all of that document except the non-typed writing at the top, which reads "In re: Detroit Edison Company" and the bracket on the left column of that exhibit.

(The document above referred to was marked as General Counsel's Exhibit No. 7 for identification.)

MR. HOUGHTON: No objection.

JUDGE BARBAN: This is General Counsel's Exhibit 7, it's received.

(The document heretofore marked as General Counsel's Exhibit No. 7 for identification was thereupon received in evidence.)

MR. CIARAMITARO: Then there is GC-8, a letter, with attachments, and there are three pages of attachments, dated July 10, 1973, from Mr. Houghton to Mr. Lewis, which makes re- [27] ference to the June 2 letter.

(The document above referred to was marked General Counsel's Exhibit No. 8 for identification.)

MR. HOUGHTON: No objection.

JUDGE BARBAN: General Counsel's Exhibit 8 is received.

(The document heretofore marked as General Counsel's Exhibit No. 8 for identification was thereupon received in evidence.)

MR. CIARAMITARO: Then there is GC-9, a letter dated July 18, 1973, from Mr. Houghton to Mr. Lewis. That letter, in its first sentence, indicates that this is a reply to a July 13, 1973 letter from Mr. Lewis to Mr. Houghton. We are still looking for a copy of that July 13 letter.

And, as a further explanation, Mr. Houghton will catch me if I go wrong, my understanding is that when this letter was received by Mr. Lewis, that he typed in at the bottom of page two of that letter, a reply to it, which reply is dated July 23, 1973, and forwarded it back to Mr. Houghton. Is that accurate?

MR. HOUGHTON: Yes, that is accurate.

(The document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

MR. CIARAMITARO: So with that explanation, I would like to offer GC-9.

MR. HOUGHTON: We have no objection. And we'd like to indicate, your honor, we discussed the July 13 letter. Apparently [28] neither of us have copies of it here. And if it's agreeable, we would stipulate to provide your honor with a copy of that letter so the record is complete—either by mail or through the Board or attaching it to our briefs.

JUDGE BARBAN: First, let me indicate that General Counsel's Exhibit 9 is received.

(The document heretofore marked as General Counsel's Exhibit No. 9 for identification was thereupon received in evidence.)

JUDGE BARBAN: With respect to the asserted July 13, 1973 letter, if the parties discover the letter within 30 days after

the close of the hearing, and if you both agree—and this includes Mr. Lewis—if all parties agree the letter is accurate and should be received, I will receive it if you send it to me with a proper stipulation.

MR. CIARAMITARO: We can make it a joint submission.

JUDGE BARBAN: And I would suggest—well, General Counsel, why don't you reserve your exhibit No. 13 for the letter dated July 13.

MR. CIARAMITARO: Okay, fine.

JUDGE BARBAN: And we'll leave that open in case you submit the letter.

MR. CIARAMITARO: Next is GC-10, a letter dated August 6, 1973, from Mr. Houghton to Mr. Lewis.

(The above referred to document was marked General Counsel's Exhibit No. 10 for identification.)

[29] MR. HOUGHTON: No objection.

JUDGE BARBAN: General Counsel's Exhibit 10 is received.

(The document heretofore marked as General Counsel's Exhibit No. 10 for identification was thereupon received in evidence.)

MR. CIARAMITARO: As GC-11, a letter from Mr. Lewis, dated August 9, 1973, which is addressed to both the arbitrator and Mr. Houghton, which enclosed GC-12, which is a bilateral agreement dated August 6, 1973 and executed by both Mr. Houghton and Mr. Lewis.

(The document heretofore marked as General Counsel's Exhibit No. 11 for identification and General Counsel's Exhibit No. 12 for identification.)

MR. HOUGHTON: No objection to either of those two exhibits.

JUDGE BARBAN: General Counsel's Exhibits 11 and 12 are received.

(The document heretofore marked as General Counsel's Exhibit No. 11 for identification and General Counsel's Exhibit No. 12 for identification were thereupon received in evidence.)

Q. (By Mr. Ciaramitaro) Mr. Lewis, the last exhibit we had was the letter of August 9 from you to the arbitrator, which enclosed the written agreement between you and Mr. Houghton, dated August 6. After August 9, 1973, do you recall ever again making any verbal or written requests for the information that you had been requesting all along, after August 9, 1973? [30] A. After August 9, 1973?

Q. Yes. A. Well, yes. Getting back to the chronology of these events, on August 6 Mr. Houghton and I signed what might be called ground rules for filing the briefs and holding certain things in abeyance.

The arbitrator's decision came down and it was the type of decision which called for further activity on the part of both of us. We had to re-examine certain employees. So we had to have another hearing. We disagreed as to the placement that certain employees, even after the arbitrator's decision came down. We had to have another hearing.

So at the outset of the new hearing, I again reiterated my demand for disclosure of the tests. I said now I need them worse than ever. I thought that the arbitrator's decision made it quite clear to me that I should have them. I couldn't proceed the way I wanted to unless I got the information. So, again, I reiterated and that was on the re-hearing, recently. I don't know the exact date. I have to get my book. July of '74.

MR. CIARAMITARO: Mr. Houghton, can we stipulate that that re-hearing date was July 18, 1974?

MR. HOUGHTON: Yes, that is correct.

THE WITNESS: Yes.

MR. CIARAMITARO: I'd also like to propose a stipulation that—I'd like to have this marked.

[31] (The document above referred to was marked General Counsel's Exhibit No. 14 for identification.)

MR. CIARAMITARO: I would like to propose a stipulation that GC-14, that that hearing of July 18, 1974, was based upon a submission, question for resumption of hearing submitted by Mr. Lewis, which would be GC-14.

MR. HOUGHTON: No objection.

JUDGE BARBAN: General Counsel's 14 is received.

(The document heretofore marked as General Counsel's Exhibit No. 14 for identification was thereupon received in evidence.)

Q. (By Mr. Ciaramitaro) So you've indicated that at this July 18 hearing you made additional requests? A. Right.

Q. Now, what, if any, response was there to those requests by company representatives at that hearing? A. The company position was the same, they couldn't give me the actual tests, the test batteries, the individual scores attached to individual names and so forth and so on. It was a reiteration of their previous position.

Q. Now, since the close—did that hearing close? A. Yes.

Q. Since the close of that hearing, has the arbitrator issued any decision of any sort? A. No, it's pending.

Q. Pending now. Mr. Lewis, referring to the grievance PMO-123 [32] could you very briefly tell us what basically was involved in that grievance. A. Yes.

Q. Not about the merits, but what the claim was. A. There was a vacancy posted for six instrument repairman jobs at the Monroe powerplant. Monroe is a city near here. Normally people promote from within the plant, that's the first priority. So some ten, I believe it was ten people, from the plant bid for those jobs.

If the management is unable to get people from within the plant, they are allowed to go to other plants. The seniority is sort of on a plant basis. The priority is on a plant basis, if you want to call it that. The management foreclosed the entire ten people from the Monroe plant, who did, on the ground that they did not pass these tests. Solely for that reason.

On the other hand, they selected people from the second priority whom they said did pass these tests. So the sole criteria used was whether they passed that test or not. Now these men all agree they had a grievance.

Q. Those people who did not get the jobs are those that filed the grievance, is that correct? A. That's right.

Q. Obviously those that got the job didn't file a grievance? A. They didn't file any.

Q. Those that got the job were from outside the Monroe plant? [33] A. That's correct.

Q. Those that did not get the job were from within the Monroe plant? A. That's correct.

Q. During that grievance proceeding, the time it was filed, up to now, you have requested the actual tests themselves?

MR. HOUGHTON: I'll object to the conclusionary nature. We've had evidence that requests were made at the arbitration level, but there's been no evidence any requests were made while the grievance was being processed.

MR. CIARAMATARO: I'm sorry, then. At one or another time, including the arbitration, that requests were made, is that right?

THE WITNESS: Formally the requests were made in the very beginning and then they were made at the arbitration level, and they were discussed many times through-

out the proceeding. Every so often the question would arise. Now, if I only had the tests, I could do something, but I didn't get them. So——

Q. (By Mr. Ciaramitaro) The question I have is what do you need the tests for, the actual tests. A. Under the clause, which is Article B, Section 38, it's a sort of a vague generalized criteria. It says normally the vacancies are filled by members of the bargaining unit, that specific bargaining unit, which is Monroe Plant.

And then you get into reasonable qualifications and abilities [34] being considered. Then total length of service would govern, and so forth. Then there is another thing there called significant difference shall be head and shoulders difference. These are kind of vague criteria, I agree.

For the first time, to my knowledge, and I have been dealing with Detroit Edison since about 1952 or 1953—and I've been in on all their negotiations from about 1953 to 1970 when I left to go to Washington on this new job—this was the first time that the tests became a new dimension. That is to say you have to get over this hurdle, pass the tests, before we will even consider your reasonable qualifications and abilities. If you don't get over the tests we won't even admit you to an examination of further abilities and further qualifications and, of course, you wouldn't get it at all.

So the length of service meant nothing. If the employee couldn't get over that first hurdle he just didn't get anywhere. So I figured since this was such a very important new dimension which I had not seen before, I wanted to see what these tests were all about. And I wanted to see the scores of this man versus the other man, the scores within the Monroe plant as contrasted to the people who got the job from outside the Monroe plant. And that is why I made the request. That's the first thing. You're asking me for reasons.

Q. Those are the reasons. Are there additional reasons for these requests? [35] A. Then I'd be getting into merits, maybe when I would get the tests. Are you asking me what I would do with them? That would be getting into merits and I don't suppose the Board——

Q. What you needed the tests for? A. It's an entirely new dimension. It was a new hurdle over which the employees had to jump before they'd even get consideration.

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CROSS EXAMINATION

Q. (By Mr. Houghton) Mr. Lewis, I understand you wanted the [36] tests because of a new dimension. Now any other reasons other than that? A. I think that's really enough. Again, I don't want to get into the merits because this is a question of disclosure here. But I would see the relevance of the tests to the job. Obviously if there was Einstein's theory in there I would say that was an unfair test or things like that. I'm getting into merits, though.

JUDGE BARBAN: Mr. Lewis, I don't think we can make that clear distinction between merits and relevance at this point. I think it is true that I'm not going to pass on the merit of your grievance to the extent that I'm not going to decide whether one may or should in fact, get a job over another, if that's what you're talking about, merits. But I have to know enough about the relation of the tests to the problem.

THE WITNESS: Okay, Now I will go back to you question, you honor, as well as answer counsel's question at the same time.

JUDGE BARBAN: Now you answer counsel's question, let's not go back to any other question.

THE WITNESS: Well, all right. I must know the reasonable relevance of the tests to the job. I got to know that. I've

got to know the individual score attached to the individual name. I never got that. I must see it. I must verify it.

Q. (By Mr. Houghton) All right, now, do I understand, Mr. Lewis, taking the second point first, that the reason you wanted [37] to see the scores with the names was to verify the accuracy or the determination? A. Right. First I wanted to see if you scored everybody the same way.

Q. I'm speaking of your response. If we could stick to this one point for the moment. You said you wanted to see the scores individual employees received opposite a particular score. A. First I would have to see you scored everybody uniformly, the same way.

Q. We're jumping into the scoring procedure. I'd like to stick with just the scores. You wanted to see the scores themselves? A. Yes.

Q. And the purpose of that was to what? Verify? A. Right.

Q. What the company had told you already. A. The company had never told me a score.

Q. Well the scores were disclosed during the arbitration, were they not? A. No they were not.

Q. Were they not disclosed? A. No, sir, they were not.

Q. Let me finish the question—without reference to particular employees names, A, B, C, D, E, F, G? A. X, Y, Z. That couldn't tell me very much. I agree.

[38] Q. Were those disclosed in that fashion? A. There was an exhibit given if that's what you're talking about and it goes like this: The battery scores in grievance PMO-31, employee one was an incumbent, employee two got twelve point eight; employee three got twelve point three, employee four got ten point four; employee five got ten point four, employee six got ten point four. For those who did not get the job, the grievance, employee one got nine point three, employee two got eight point seven, em-

ployee three got eight point five, employee four got seven point "o", employee five did not show up for the testing, employee six did not show up for the testing.

Now, beyond——

Q. Excuse me. My question at this point, Mr. Lewis, is after receiving that information you had the scores, but you didn't know which score went to which employee, is that correct? A. That is correct. And this was only twelve people.

Q. That involved all of the grievants? A. Let me go back a bit.

Q. Before we go back. I have a specific question. There were a certain number of grievance, is that correct? A. Yes.

Q. Ten? A. The grievance speaks for itself. I think it says that the people in the Monroe plant should have got the job and not the [39] people on the outside.

Q. Does not that exhibit purport to be the scores from the folks at the Monroe plant? A. This is what management said, yes, without putting a name to a score. You said employee one, employee A, employee B, and so forth.

Q. Now I'd like to turn to a second dimension and that is the method or manner in which these types of tests are scored. Did you, at one point, during discussions with the company, ask for an explanation as to how these tests are scored? A. I might have.

Q. I refer you back to the meeting that resulted from your March 5, 1973, request. Do you recall, at that meeting, having Mr. Roskind explain to you how the tests are scored? A. I believe he gave explanations.

Q. Do you recall—— A. But again, not with specific names or grievants, just generalizations.

Q. Yes. I was speaking of the manner in which they're scored. A. Yes.

Q. Do you recall, at that meeting, for example, having asked Mr. Roskind are those tests scored by keys or is

there some subjective analysis involved? A. Yes, I believe I asked that questions.

Q. And do you believe or recall Mr. Roskind reply that these [40] are scored by keys, that there is no subjective analysis? A. Roughly, yes, something like that.

Q. Now with respect to the tests themselves. As I understand it you said you wanted to look at the actual tests to determine their relevance. Is that correct? Now, first of all, in making a determination as to relevance, have you yourself had any training in the field of psychological aptitude testing? A. No.

Q. You, yourself, would not be qualified to make a decision as to whether a particular test was relevant in terms of statistical analysis, would you? A. I really don't know.

Q. Now when you speak of relevancy, if I understand your answer, you're looking at what is called the concept of face validity. In other words, if you looked at a question and it said do you like to go up north for your summers or down south? If that question was asked on the instrument man test, you might well conclude that that question doesn't have any face validity, it's ridiculous and it shouldn't be asked. Is that the type of thing you were looking to determine? A. No, so I mentioned Einstein's theory, of course.

Q. Well I don't know whether Einstein's theory might or might not be appropriate to instrument man work. A. I might argue that it shouldn't be. That would give me a new argument for the arbitrator, which I didn't have.

[41] Q. In other words, are we in agreement that basically what you were looking at was to determine the so-called face validity of the various questions asked? A. Yes. I think my reading of most of the arbitrations in this respect indicate to me——

Q. I'm not interested in your readings of the arbitration cases. A. Well, we have to go by some barometer and it seems where tests are employed——

Q. Excuse me, Mr. Lewis, where tests are—I don't think this is responsive. My question is why did you want this information? And your answer is to determine the face validity.

MR. CIARAMITARO: He's interrupting the answers to the questions.

JUDGE BARBAN: The witness is entitled to give a full explanation of why he wanted the information. If his reason is based on his research you can still say that. You may complete your answer if you have not done so.

THE WITNESS: My experience with these types of cases indicates that where a test is given it must have some reasonable relationship to the job at hand. It cannot—and I won't go into whether arbitrators at other places have ordered the material put out on the table or given the material to the union or things of that kind. And I'd also find that there's such a thing as an unreasonable cutoff score and a reasonable cutoff score, which [42] we have no control over whatsoever. And more than that, in this case, what we had experienced in the past was an employee appraisal system on promotions—that is to say a supervisor, a group of supervisors would sit in judgment as a council and appraise employee A, B, C and D as to one, two, three, four, five good or bad, as to his absentee record, as to his mechanical ability, as to his cooperation, as to his knowledge of company rules, and so forth. And practical things. This is what we had experienced in this company up to this time.

Now, all of a sudden, we had a psychological test hurdle over which the employee must jump. And the management made it very clear that he must jump that hurdle. There is no other way. The didn't say if the cutoff score was ten, that if he got nine and a half and he was a twenty-year man, he would be admitted. Or, if he got ten and a half and he was a two-year man, he wouldn't.

In other words, there was no variation there. No flexibility. A twenty-year man could get one half point away from the cutoff score and be outlawed, foreclosed. So that was our problem.

Q. (By Mr. Houghton) Looking at the actual tests themselves, so we're clear. You want it, as I understand it, for the reasons you've given. To look at the tests, to determine whether or not the questions had any face validity. A. The word validity I'm not clear on, Ralph. It's an expression that's apparently used by psychologists. I wanted [43] to look at relevance, yes.

Q. Okay. Let me give you my explanation or what I intend when I use the expression face validity. To look at the question and see whether they look like they had anything to do with the job. A. All right.

Q. Now you mentioned a cutoff score. You don't claim, do you, that by looking at an actual test, you thereby determine what a cutoff score is? A. No. But again, as I just said a moment ago, if I had a twenty-year man and the cutoff score was fifty, let's say, and he only got forty-eight and a two-year man got fifty-one, you see. I don't think that's enough of a variation to keep that twenty-year man from getting the job.

Q. Mr. Lewis, do you know they determine, statistically, a cutoff score? A. I saw how they do it, yes. I'm not saying I agree with it, but I saw it.

Q. And the data necessary to determine the cutoff is not found in the test itself, is it? A. No. I saw how they do the scatter charts, if that's what you're thinking about. And how they give the test to incumbents on the job and then take the average and things of that nature, if that's what you're talking about. I've seen them do that, yes.

[44] Q. I would agree with you, Mr. Lewis. If I were in your shoes I would think I'd have a right to determine whether the test was job related, whether it was valid and whether, when it is applied, it's consistently applied and measures what it's supposed to measure. I think that's

essentially what you're after. Now my question to you is that in determining validity or consistency of a test, do you not have an understanding, from this case, that information is gathered, not from a test itself, but from a validation study? A. Yes, I seen those. I'm not saying I agree with that. I'm saying that's what you do.

Q. All right, looking at this grievance PMO-123, you mentioned in your direct examination that it did go through the company's grievance procedure and through arbitration. A. That's right.

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[50] Q. (By Mr. Houghton) Mr. Lewis, in previous testimony it's been indicated that there were four days of initial hearing before an arbitrator in this case and a fifth date on a subsequent hearing in July of this year. Is that correct? A. That's right.

Q. Transcripts were made each of those days? A. Yes, sir.

MR. HOUGHTON: I will ask the reporter to mark as proposed Respondent's Exhibit 7, the May 23rd hearing transcript; and proposed Respondent's Exhibit 8, the May 24th transcript of hearing. As proposed Respondent's Exhibit 9, the May 30th transcript of hearing. And as proposed Respondent's 11, the July 18th, 1974 transcript of hearing.

(The documents above referred to were marked Respondent's Exhibits No. 7 through 11 for identification.)

[51] JUDGE BARBAN: Off the record.

(Discussion off the record.)

JUDGE BARBAN: Back on the record.

Q. (By Mr. Houghton) Mr. Lewis, I hand you what has been marked as proposed Respondent's Exhibit 7 through

11 and ask you if those are, in fact, transcripts of the record of this case, that is PMO-123, before the arbitrator.

JUDGE BARBAN: Mr. Ciaramitaro?

MR. CIARAMITARO: Yes, your honor?

JUDGE BARBAN: Subject to your further check of the documents that have been offered, can't we stipulate that these are what counsel is stating they purport to be?

MR. CIARAMITARO: Yes, you honor, I'd be willing to so stipulate.

JUDGE BARBAN: Do you have any problem with that, Mr. Lewis?

THE WITNESS: What?

JUDGE BARBAN: That those are actually the transcripts of the arbitration.

THE WITNESS: Those are.

JUDGE BARBAN: Are you offering those?

MR. HOUGHTON: Yes, we would offer those at this time.

JUDGE BARBAN: I'm not able to talk you out of it? All right. That was meant to be facetious, by the way. Respondent's Exhibits 7, 8, 9, 10 and 11 are received.

[52] (The documents heretofore marked as Respondent's Exhibit Nos 7, 8, 9, 10 and 11 for identification were thereupon received in evidence.)

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[54] (By Mr. Houghton) Mr. Lewis, I'd like to refer to this March 5 request so that we can determine actually if any was taken by the company. I'm referring to General Counsel's Exhibit 4, in which you make four specific requests, is that correct? A. Yes.

Q. And with respect to your first request, the actual battery of tests used in the matter, as I undersand it,

those were not furnished? We did not supply them? A. That is correct.

Q. With respect to number two, the method of scoring or grading and the actual criteria for finding recommended or not recommended. Now the material for recommending validation was [55] not in the study, is that correct? The actual scores—employees names were not provided, but the scores were provided? A. Right.

Q. The company did not supply actual scores with actual names. They did give, at the hearing, a generalization of how they went about it. Is that what you wanted?

And I'm referring not to the hearing, but to this letter. At the hearing subsequent to this letter, you were, it was explained to you how the company went about grading these tests, what criteria was used. A. Yes, there was a generalization of that kind, right.

Q. And a method of scoring was explained? A. In a generalized way. From a psychologist's standpoint, yes.

Q. All right, now item number three is entitled a report on the test validation. Now the validation studies were given to you, were they not? A. There was a validation study given me, that's right. The question here is there are validations these days, and there are validations. I could have been probably clearer in my request, but they have now what's called the EEOC validations, Equal Employment Opportunity Commission validations. Now they have validations within the company, and sometimes the companies have to go to the EEOC and say are our validations consistent with the new law, and Title Seven case and all that sort of thing. [56] This all came in to this question here. But you did give me what you consider to be a validation study on the subject. Right.

Q. Mr. Lewis, you're not aware, are you, of any other validation studies on this particular battery of tests for this job? A. No, no.

JUDGE BARBAN: Mr. Lewis, for my information, what is a validation. What is your interpretation of a validation?

THE WITNESS: Well, it's a system that is used by people who give tests to decide whether it is a fair test if given to the same incumbents on the job now.

For example, if there were forty people in the job and they were making four others, they might try to get a consensus of what the forty people know and what skills the forty people have and what dexterity the forty people have to be able to give a test for those four others. In other words, it's a relevance to the job, a predictability for the job. That's about it. It's kind of vague, but this is the way it's done as I understand it.

JUDGE BARBAN: And as I understand it the company gave you the conclusions of some other organization as to whether or not the tests were fair and relevant. And it's simpler—to put it in it's simplest form?

THE WITNESS: They sent some of their tests, this company is having a problem as well as our union, with the Federal courts [57] right now. The equal employment opportunity commission has leveled a Title Seven charge against both of us on the grounds that the company didn't hire enough minorities and promote enough minorities. And against the union because the union perpetuated a seniority system which doesn't help that any.

All of this happened about the same time, so the company was in the process what was fair and honorable testing for people. And I think they engaged some consultants from Texas or somewhere to go over their validation studies, those that they had made themselves, in-house validation studies, quite apart from EEOC validation studies to see if these were fair and proper and would meet the standards of, let's say, the psychological society rather than the EEOC.

That's what I'm saying. I know I'm getting complicated, but——

JUDGE BARBAN: Now you've explained to me what I wanted to know. I'm sorry to have interrupted you, Mr. Houghton.

MR. HOUGHTON: That's all right, you honor.

Q. (By Mr. Houghton) So that we're clear about following the judgments in question, Mr. Lewis, this request number three, entitled report on the test validation, what you were after there was the Detroit Edison validation? A. Yes.

Q. And you received that? A. Yes, and if you had any EEOC validations, I would have [58] accepted that too. But I guess they didn't have any.

Q. Number four says a report by the National Compliance Company? A. Yes.

Q. You received that report also? A. Yes. Which, by the way, was critical in some ways of Detroit Edison's systems.

Q. The National Compliance Company did find that the test battery was a valid test battery, with a proper—— A. Well, again, if we want to get into that report I think it also said you promoted certain people without any tests at all, so you get into all kinds of ramifications of that particular report. The fact is that—I have it here, somewhere.

Q. I don't mean to cut you off, but I think for purposes of this hearing we are not concerned with—not so much with what the report had to say but whether it was furnished or not. A. It was furnished.

(A document was marked Respondent's Exhibit No. 13 for identification.)

Q. (By Mr. Houghton) Mr. Lewis, I hand you a booklet which has been tentatively marked proposed Respondent's

Exhibit 13 and ask you if you can identify that for us? A. Yes. I believe this is a document given to me at the Detroit Edison Company whatever date that was.

Q. For the record, you're referring to the April second [59] meeting? A. April second. This was the document given to me at that time.

Q. And am I correct that this was the document given to you in your request of paragraph three of your March 5 letter? A. Yes, this was purported to be a type of validation which Edison used.

MR. HOUGHTON: We would offer the exhibit, your honor.

MR. CIARAMITARO: No objection.

JUDGE BARBAN: No objection? Respondent's 13 is received.

(The document heretofore marked as Respondent's Exhibit No. 13 for identification was thereupon received in evidence.)

(A document was marked Respondent's Exhibit No. 14 for identification.)

Q. (By Mr. Houghton) Mr. Lewis, I now hand you what has been marked proposed Respondent's Exhibit 14 and ask you if you could identify that? A. Yes, this is the document by the National Compliance Company of Texas, which is some kind of a consulting company which the company used. Right, that was given to me.

Q. And was that the document that was given to you in response to your request number four in your March five letter? A. Yes, that's four.

MR. HOUGHTON: We would offer the exhibit, your honor.

JUDGE BARBAN: Any objection?

[60] MR. CIARAMITARO: No objection.

JUDGE BARBAN: Respondent's 14 is received.

(The document heretofore marked as Respondent's Exhibit No. 14 for identification was thereupon received in evidence.)

JUDGE BARBAN: I assume that was given to him on the some day, April second?

THE WITNESS: Yes.

Q. (By Mr. Houghton) Is that correct Mr. Lewis? A. Yes that was, two documents I was given on that day.

Q. Now, with respect to the April second letter, you testified earlier as to who was present? Would I be correct that in addition to the persons you named, your Local president, Mr. Johnson was present at that meeting? A. I don't recall whether he was. I'm willing to agree, Ralph, but life to me is one new face after another, so maybe he was.

Q. You have no present recollection? A. If he was, that's all right.

Q. Mr. Lewis, now in addition to the materials that we've discussed in the exhibit I just introduced, did the company disclose additional information pertaining to the types of questions on the tests at the arbitration hearing? A. Yes, yes. The company gave—well one thing here, Titled, example, multi-aptitude test. Another one was called the formulation test, a mathematical reasoning test. These [61] were like sample tests bought off a counter in a store, to show us that these are the kind of things that we do. That these samples, so to speak, and, are supposed to be some kind of relevance to the real tests. The form board samples were here and so forth. Just samples.

Q. Would I be correct, Mr. Lewis, that these samples were given to you that they were representative of the types of questions on the test, that they were not the actual test questions. A. They were not the actual test questions. If they were then you would have been complying with my request.

(A document was marked Respondent's Exhibit No. 15 for identification.)

Q. (By Mr. Houghton) Mr. Lewis, I hand you what has been marked proposed Respondent's Exhibit 15, titled "Multi-Aptitude Test", and ask you if this is a copy of that furnished to you at the arbitration hearing? A. Yes, this was given at the arbitration as a sample for the arbitrator and for us, I suppose.

Q. And would I further be correct, looking at the front page of that exhibit, that item roman numeral ten, paper form board was indicative of the type of questions on the form board test? A. Yes, in the back of that, I think is some samples. The last two pages were samples of Minnesota form board, the last three pages.

Q. With respect to roman numeral six, mechanical comprehension, [62] were those samples of certain other questions on the EPSAT test? A. Mechanical reasoning?

Q. Mechanical comprehension in this booklet? A. Within the book? I'm sorry, yes. I think, mechanical comprehension, yes, is a section of this book with some samples.

Q. And questions of that type were on the EPSAT test, is that right? A. That's what you said.

Q. That's what the representation was. A. Yes.

Q. Looking at roman numeral three, which is entitled "arithmetic, was a representation made that those samples under Roman numeral three, were like types of questions on the EPSAT test? A. Yes. This little book had some sample arithmetic questions.

Q. And you said that—— A. And you said that the company said that these were likely the questions given on the real test.

Q. And the same is true with Roman numeral one, vocabulary? A. Yes, the first section in this book was vocabulary. And you said that this was a vocabulary test pretty much similar to that given in a real test.

Q. Now am I also correct the company represented, with respect [63] to Roman numerals two, four, five, eight and nine, that those matters did not have any particular relevance to the EPSAT test? A. Yes, the company said that's true, called general information was not used. Four, called number series, was not used. Five, called figure classification, was not used. Seven, word recognition, was not used; and eight, scrambled letters, was not used. And nine, checking, you said, was not used.

Q. Thank you, Mr. Lewis. We would offer this exhibit.

MR. CIARAMITARO: No objection.

JUDGE BARBAN: Respondent's 15 is received.

(The document heretofore marked as Respondent's Exhibit No. 15 for identification was thereupon received in evidence.)

Q. (By Mr. Houghton) All right, Mr. Lewis, with respect to information on what we have referred to as the EPSAT test, is it your understanding that this is a six-part test? A. The company said it was, yes. A series of tests.

Q. And, referring to the previous exhibit, you were only supplied with copies of questions that would pertain to three of the six sections on EPSAT and the form board? A. I believe that's what the company said.

Q. Now, with respect to the other three sections of the EPSAT test, did the company endeavor to provide you with examples of the types of questions on those remaining three sections? A. The company gave me a—a thing called formulation, if that's what you're talking about, which gave just a few samples, [64] two samples of questions, physical science comprehension, which gave one sample and arithmetic reasoning, which gave two samples. Is that what you're talking about?

Q. Yes. Now this information was given to you at the arbitration hearing? A. That's right.

Q. In addition to that information, with respect to these three areas, that is, formulation, physical science comprehension, and arithmetic reasoning. Were you given further examples of each of those? A. I got another one called mathematical reasoning, is that what you're talking about?

Q. Yes, that's one of them. A. It's a different title, mathematical reasoning, versus——

Q. Arithmetic reasoning. A. Arithmetic reasoning, but anyway, we were supplied some samples of mathematical reasoning questions. Right.

Q. Were you also supplied with further examples of physical science comprehension questions? A. Just a moment. Yes, we were supplied with some homemade, there were homemade, these were not store bought. Is that what you are talking about? Questions about physical science comprehension, which our instrument found incredible.

Q. And were you supplied, also, with additional examples of [65] formulations type questions? A. What would be the general title of formulations? Computer, what do you call it?

Q. Sixty-two. A. I got sixty-two, about arithmetic reasoning?

Q. Formulation. A. Well, we differ as to title on that. You mean we got some further instructions or what's known as part three and its title up on top, computer programmer, arithmetic reasoning and so forth. Yes, I know what you're talking about. We got it.

(A document was marked Respondent's Exhibit No. 16 for identification.)

Q. (By Mr. Houghton) Mr. Lewis, I hand you a copy of proposed Respondent's Exhibit 16 and ask you if that is the information you were given, which had two questions in each of the three categories we just discussed? A. Yes, I have it in my book, that's the one.

Q. And that was furnished at the arbitration hearing? A. Yes, it was.

MR. HOUGHTON: We would offer the exhibit.

JUDGE BARBAN: What number is that?

MR. HOUGHTON: Sixteen.

JUDGE BARBAN: Any objections?

MR. CIARAMITARO: No objections.

JUDGE BARBAN: Respondent's 16 is received.

[66] (The document heretofore marked as Respondent's Exhibit No. 16 for identification was thereupon received in evidence.)

(A document was marked Respondent's Exhibit No. 17 for identification.)

Q. (By Houghton) Mr. Lewis, I hand you what is marked proposed exhibit 17 and ask you if this is the additional information you were respect to the arbitration hearing? A. Yes, I have this in my book, which indicates it was given at the arbitration hearing.

MR. HOUGHTON: We would offer 17.

MR. CIARAMITARO: No objection, your honor.

JUDGE BARBAN: Respondent's 17 will be received.

[66] (The document heretofore marked as Respondent's Exhibit No. 17 for identification was thereupon received in evidence.)

(A document was marked Respondent's Exhibit No. 18 for identification.)

Q. (By Mr. Houghton) Mr. Lewis, I hand you what has been marked as proposed Respondent's Exhibit 18 and ask you if that's a copy of the information furnished you about formulation of the EPSAT test. A. Yes, I have that in my book, which indicates it was given at the arbitration hearing.

MR. HOUGHTON. We would offer Exhibit 18, your honor.

MR. CIARAMITARO: No objection.

[67] JUDGE BARBAN: Respondent's Exhibit 18 is received.

(The document heretofore marked as Respondent's Exhibit No. 18 for identification was thereupon received in evidence.)

(A document was marked Respondent's Exhibit No. 19 for identification.)

Q. (By Mr. Houghton) Mr. Lewis, I hand you what has been marked proposed company exhibit 19 and ask you if this is a copy of the questions showed to you on computation in the tests? A. Yes, this is the one I refer to as homemade, which our men found incredible.

JUDGE BARBAN: Do I understand that you showed some or all of these samples to your members involved?

THE WITNESS: No, no. We got this after the grievance.

JUDGE BARBAN: You showed them at some point?

THE WITNESS: At the hearings, yes, we asked the men, did you ever see these before, and so forth. Yes, that type, the grievance. Is that what you mean?

JUDGE BARBAN: I'm asking you. You're giving the evidence. You showed these samples, at some time or other, to the actual grievants?

THE WITNESS: At the hearing.

JUDGE BARBAN: Mr. Houghton, we're running close to one o'clock. Are you going to be much longer?

MR. HOUGHTON: Probably fifteen minutes or so.

JUDGE BARBAN: Go ahead.

[68] Q. (By Mr. Houghton) I refer you to General Counsel's Exhibit 10, which is a letter dated July 18, 1973, from

myself, sent to you. Attached to that letter is certain information regarding test procedures, is there not? A. Yes.

Q. You were furnished with those attachments at the time you received the letter? A. Yes.

Q. And am I correct that that information purports to be an explanation of battery weights, raw scores and items on the Minnesota form board EPSAT test? A. Yes.

Q. And—— A. That is what you reported to me, method used.

Q. And the last attachment, would I be correct that that demonstrates the weights and raw scores on the tests? A. Yes, if I understand it correctly the raw scores are reconciled to a weight and the two weights put together register the man's total score. Is that it?

Q. All right, now, Mr. Lewis, you understand, do you not, that these tests we're talking about, this test battery, is designed to measure psychological aptitudes? A. That is the way they reported it, yes.

Q. And the test is not designed, as you understand it, to measure job knowledge, is it? [69] A. No, I guess not. At least that's what you said.

Q. With respect to determining pay rates in the company, would I be correct that all pay rates for all jobs, including this job in questions, are negotiated between the company and the union? A. Yes, they are negotiated.

Q. And there are specified questions where you go from a specific starting to a final maximum range? A. Yes.

Q. And this test we're talking about was not used to determine pay rates as such, was it? A. No.

Q. In terms of the scores, were you also advised that the company used this test in the fashion of a go or no go situation. In other words they were not using test scores to compare one person with another. A 10.3 or a 10.4 or a 10.5, it was not used for internal comparisons like that, was it? A. That's correct. You said that this was a go, no go, pass, fail system. You either got over the hurdle or you didn't and if you didn't get over the hurdle you didn't

get considered for the job, is that what you mean? A. Yes.

JUDGE BARBAN: Just to clarify my own thinking, we are talking about a promotional situation.

THE WITNESS: Yes.

[70] JUDGE BARBAN: Are we not?

THE WITNESS: Yes, in this case.

JUDGE BARBAN: Mr. Houghton?

MR. HOUGHTON: If we're speaking the same language, there were openings within a job classification. Under the contract, the employees can sign up on a bid sheet and bid for that opening and that's what we're talking about.

JUDGE BARBAN: And you permit—for my purposes, I find—the contract—do you permit lateral movement or is this only up and down?

MR. HOUGHTON: The employee can bid wherever he wants, subject to the terms of the agreement.

JUDGE BARBAN: Thank you.

THE WITNESS: The priorities within the individual headquarters, to start with, I think I pointed that out in the first place. The first priority is there, then the other priorities come in.

Q. (By Mr. Houghton) Mr. Lewis, in your testimony, I believe you stated earlier, that when the grievance was initially filed, that demands were made for actual copies of the tests? A. Yes.

Q. The only evidence that I've seen is that after the grievance went through the first, second and third steps, and when it got to arbitration, I believe, on May 23, you furnished a written request for some certain information. Prior thereto, [71] you're indicated your first formal request was March 5, in your letter to the company.

Now what actual request for the information was made prior to March 5, 1973—of your own knowledge? A. I really don't know. When they asked me to come in and handle the arbitration case for them I said well, we'd better get disclosure on these tests and on these cutoff scores and on these grades which these people got. That's my number one proposal.

So I told the union we'd better immediately demand disclosure. If we're going to an arbitrator it's a little different than processing a case with a supervisor.

Q. So prior to March 5, you've had no involvement and wouldn't know whether there was or wasn't any request? A. No, I don't.

MR. HOUGHTON: That's all I have.

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REDIRECT EXAMINATION

Q. (By Mr. Ciaramitaro) All of these sample tests, sample questions, you were never provided the actual questions for the [72] test that was used? A. No, sir, we were not.

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[80] DIRECT EXAMINATION

Q. (By Mr. Houghton) Mr. Lewis, at any time, did you ask any of your members, employees of the Edison Company, if they would consent to the company's releasing their test scores? A. No, and I might add I wouldn't dare because we are the collective bargaining agents and the company doesn't deal with individuals, they deal with us.

Q. You made no such request? A. No, and I will not.

Q. Now at any time, Mr. Lewis, after you were furnished with this information we've been discussing, did you or your union, at any time, turn it over to or seek to consult with a professional psychologist? [81] A. I briefly talked

with a fellow from the university of Wisconsin, who is a friend of mine, if that's what you want to know.

Q. But you did not formally turn this material over, for example, to a professional psychologist and say—— A. No.

Q. ——excuse me, can I finish? You have some material the company has furnished me, can you make a determination for me as to whether this is or is not a valid test? A. My view on the question is like the one I just answered. We have twenty-five bargaining units here, each is an independent bargaining unit. There were twenty-five elections over the years and there are twenty-five units. These twenty-five units are certified on wages, hours and working conditions.

This question of us giving certain material from the company and turning it over to a professional psychologist doesn't sit well with us. We think the people on the firing line ought to understand the criteria put forth for promotion. It shouldn't have to be sent to some professional psychologist. Why shouldn't the chairman of each plant understand the criteria for promotion? This is our problem.

Q. Without appropriate training, fortunately or unfortunately, I guess, we are not able to understand all matters. My only question was you did not seek outside psychological consulting services at all? [82] A. Not in that sense. I talked to a friend of mine. He's familiar with this subject and I just wanted to get what he thought, that's all.

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[83] DR. MARVIN DUNNETTE

(a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

JUDGE BARBAN: Be seated, please.

Q. (By Mr. Houghton) Sir, will you give us your full name for the record, please? A. Marvin D. Dunnette.

Q. Mr. Dunnette, where do you reside? A. Minneapolis, Minnesota; 501 South Medow Land.

Q. What is your profession? A. Industrial psychologist.

Q. Do you have a degree in industrial psychology? [84] A. I have a Ph.D. degree.

Q. When did you receive that? A. 1954.

Q. Where did you receive that degree? A. University of Minnesota.

Q. Prior to receiving your Ph.D., what college educational training did you have in addition to that? A. I had a bachelor's degree in chemical engineering.

Q. Since receiving your Ph.D. in 1954, will you give us a sketch of the types of activity you have been involved in in the industrial psychology field? A. I worked at Three-M Company for five years. I was in charge of personnel research there. I then joined the faculty of the University of Minnesota, in charge of industrial and organizational graduate training. I directed the planning and training of graduate education in the field. I still hold that position as professor of psychology. I've done a good deal of research over the years in areas of validation of tests and selection of employees in various kinds of activities—clerical jobs, engineering jobs, sales, management. And have been involved in a number of other psychological researches.

Q. In addition to your responsibilities at the University, do you conduct any other business? A. I am president of a consulting firm called Personnel Decision, Incorporated. It's been in operation since 1967, and [85] does manpower research for both business and also under government contract.

Q. While you've been involved in this field, have you had an opportunity to do any writing in this field, in terms of books and papers? In the psychological testing area? A. I've written a number of articles on various kinds of research studies and I also have, I guess, three major books, one called Personnel Selection and Placement, that is most relevant to testing and validation.

Q. And your other two books? A. One is called Psychology Applied to Industry, and the other, Managerial Behavior Performance Effectiveness.

Q. These have all been published? A. Yes.

Q. In connection with your professional activities, Doctor, did you have occasion to involve yourself in testing programs, validity studies and matters of that sort? A. Yes, on very many cases.

Q. Prior to the instant case, have you had any business connections, in the past, with The Detroit Edison Company? A. No, I have not.

Q. Is this the first instance you've been retained as a consultant by that company? A. That's right.

Q. And will you tell us how you first had contact with the—[86] this case? A. Dr. Roskind called me, I believe, in August, and asked me if I might be available to testify. And he related to me on the phone the general nature of the case. And we decided on a possible date. And I then planned to testify. I am, you know, today.

Q. Now when you first spoke with Dr. Roskind and gained your first familiarity with this problem, what was your understanding of the problem and what you would be asked to do? A. My understanding, at that time, was that the issue was related to whether psychological tests should be made available to laymen and, believe we discussed briefly on the phone, the question of the ethics related to the release of such tests.

We also discussed, briefly, the problems of interpreting or releasing test scores, rather than the interpretation of those scores.

Q. All right, backing up to your first consideration, ethics. Are there any ethical problems or standards that are involved in releasing of this nature? A. There are two items of the ethical code of the American Psychological Association. One relating to the release of scores to unauthorized persons, and the other related to the release of psychological tests themselves to persons who are not otherwise equipped to interpret those tests.

Mr. Ciaramitaro: I object to this line of questioning, [87] so far as it relates to the ethical problems that may or may not be involved in respect to these examinations. Although I can respect the ethics problems of any professional person, we are concerned of statutory duties, not ethical duties and responsibilities and our concern here in this case is whether there is a statutory obligation to make available information relevant and necessary for a collective bargaining representative to perform his duties. Not whether that may involve an ethical problem for some other group or profession.

Mr. Houghton: We have a problem here, I think, where ethical standards may or may not conflict with statutory requirements. It's like the lawyer who is ordered by judge or court to do something which he feels would violate his code of ethics and declines to do so. And I think that for the fact finder to make an intelligent decision, we've got to have that information before the judge.

Judge Barban: Mr. Houghton, I have this difficulty. The reasons that respondent refused to or failed to give the information may be relevant, to be considered in terms of the testimony of the person who made the decision. What disturbs me here is that this is testimony in the abstract. This is testimony, for example, with respect to, let's limit it to the ethics problem right now. This is testimony with respect to this gentleman's ethics and his understanding of the ethics of a certain group. But it

doesn't help me very much with respect [88] to the reasons that someone in the company made the decision.

Mr. Houghton: If I may interject, your honor, I totally agree with that line of questioning. I was about to have this witness indicate the same ethical standards would apply to all psychologists. I do have the company psychologist. I'll reserve the question until we have him.

Judge Barban: I'd much rather have here, this kind of thing from a person who made the decision and who can be cross-examined on the decision. This witness may be and is, very competent to testify on the general standards in the profession. But cross examining him on the general standards of the profession is not going to get us very far at all.

Mr. Houghton: As I indicated, we have the gentleman in the company who made the decision. I'll wait until we get to him.

Judge Barban: I'm going to sustain the objection to that point, that I want to know and I want to hear from the people who were directly responsible. I assume, however, you have other questions of this witness.

Mr. Houghton: Yes, I do.

Q. (By Mr. Houghton) Doctor, when you were initially confronted with this problem, had the Detroit Edison Company endeavored to provide you with certain information? A. Yes.

Q. Regarding the test battery we've been discussing today? [89] A. Yes, I received the validity study from the test battery. I received the arbitration, the preliminary arbitration decision, I received a general explanation in the form of a letter from Dr. Roskind, detailing some of the background as to what had occurred.

Q. Anything else you received? A. I received a copy of the letter that was referred to this morning, the one

that you had written, the one to which you had attached pages detailing the nature of the weighting system.

Q. Now I show you Respondent's Exhibit 13, which is a study of selection tests prepared by the Edison Company. Is that the validation study that you referred to that you received? A. Yes, this is the one I received.

Q. I'd like to place you in this position, where you were called upon to render a professional opinion regarding the test at issue in this case, the instrument man test battery. And, in order to render that professional opinion, as to whether the test is a quote, good test or a valid test, or job-related, what information would you need to have? A. My major information, I'd say, in order of the importance, I would want to see any studies that had been done that are related to the instrument man battery. Any studies done by the company. Any validation studies similar to the one that I did receive. And, second, in evaluating whether the test good or not good, I'd want to look at the test manual to learn what kind [90] of information, what kind of validity had been developed by other researchers and by the test publisher. And, I guess, as a third point, I would be interested in learning how the test is administered and whether it is being administered and what standard, their answers, had been suggested by the publisher.

Q. In connection with formulating this opinion, would you have any necessity to have the actual tests themselves? A. No, I would not ordinarily have a need for the tests at all.

Q. Why is that? A. First of all, because one cannot easily determine how a test item or how a test score will relate to actual job performance without doing a statistical validity study. I can't, even though I know a great deal about psychological tests, I cannot simply sit in my armchair and decide that a particular test will not be predictive of job effectiveness on a given job.

So I really do not gain information by looking at a test. The other lines of evidence are much more helpful.

Q. We've discussed a couple of terms in testimony. I'd like you to define them for us if you can. I utilized a term "face validity" in my earlier questioning. Can you tell us what face validity is and how that relates to whether a test is or is not valid? A. That term is used in quite a few different ways. But primarily it seems to—a person has a kind of stereotype in [91] his mind, perhaps, of what a person needs to do in a job in order to be successful. He can then look at a test and if some of the questions in there seem to fit that stereotype of what a person should do in the job, one would say that test has face validity. It would seem that answering these questions in a certain way should fit the kind of notion or impression of what it takes to be successful in a particular job.

So it's a sort of a judgemental linkage between the test and the job. But it's subjective.

Q. What relevance does face validity have in analyzing the question of whether a test is valid or not? A. It doesn't have any relevance if we speak of statistical validity. It has only relevance to the extent it might be useful in a public relations sense. If persons who take a test have a feeling that it does have some kind of face validity, they'd be more accepting, perhaps, of the test.

Q. In terms of utilizing a particular test, we will refer to the instrument man test battery. In order to determine whether that test is measuring what it's supposed to be measuring, is face validity of any importance? A. Only in the public relations sense. It would not be in the strict sense of the way you worded the question.

Q. We've utilized this term validity study. You refer to Respondent's Exhibit 13 as being the study you were furnished. Could you tell us what validity is and what it's seeking to [92] determine? A. The most critical part in the carrying out of a validity study is to perform a sys-

tematic measure of job performance. In other words, develop a criteria which can be used to evaluate or measure differences in the way people are doing the job. So one would first do a very careful job analysis from which he would develop a rating scale or a set of judgments that would relate to performance on the job.

The number of persons who had been in that job might then be evaluated according to the rating scale, the criterion. They would also be asked to take the experimental battery of tests. And then statistical procedures would be used to compare the test scores with the criterion measure. And, in effect, one would be developing an estimate of how closely the test score will reflect the job performance measure, what the hits are, in terms of the agreement between high test, where there is high job performance, and to what extent there might be misses where high test scores may relate the low job performance.

But statistical procedures can be used to give us quite accurate estimates as to the degree of accuracy of a given test by predicting job performance.

Q. So in layman terms, what I understand, a validation study would be a study that you would undertake to then determine whether the test battery was, in fact, predicting what it was supposed to predict, i.e.: successful odds, successful job [93] performance? A. That's essentially what the study would be.

Q. Is that the type of study that is reflected in Respondent's Exhibit 13? A. That is the nature of the study there, yes.

Q. Before we leave this concept of fact validity, so that I understand it as a layman, let's assume we had a question on the test that said something like do you prefer to utilize a bedspread on your bed that has geometric patterns, as opposed to a solid color bedspread? And the person is supposed to indicate which answer.

Now, in the face of that question, I might throw up my arms and say "what on earth has that go to do with instrument man work?" It might not have face validity for me. On the other hand, if, in answering that questions, in fact, it was an accurate predictor of who would and would not be a good instrument man, would that be a good question to use on an aptitude test? A. It would be useful as a part of such a test.

Q. Now is that what we mean by face validity, someone would look at that question and say I like the question or I don't like the question? A. Yes, just a general impression of whether that question fits that job without referring to the statistical relationship.

Q. In addition to the validity test you said you would need [94] to look at, to reach a conclusion, you said you would also—said you would want to look at the test manuals? Now what are those and where are they found? A. Publishers of psychological tests will usually have a test manual which, in effect, is the author's statement about how he came to put the test together, why he thought this might be a useful measure to have. But more important, it would include information about the consistency or reliability of the test. In other words, whether persons would get the same general scores if they took the tests many different times. That would be a reliability statement about the test.

And then they will include information about the several validity studies that may have been performed using the test, indicating how the tests had proven accurate for evaluating different kinds of job success. And, finally, a manual will outline in some detail, exactly what the conditions are of the test administration—how the directions should be given, how the examinee would be made to feel at ease, and how the scoring should take place. Usually quite a careful statement will be given about scoring the test and reporting the test scores.

Q. Are these test manuals part of the public domain? That is could I go, for example, to Wayne State University, to their psychology department and receive a copy of the test manual? A. You could typically either go to a psychology department or, perhaps even a business library in the city of Detroit, or [95] perhaps a library at a university, and find such test manuals.

Q. These are in the public domain? Are they all open to the public? I want to understand the tie-in between validity and job relatedness. We've talked about those concepts. In fact, we've run a validation study and the study shows that test does have validity. Does that mean that it is job-related? A. Yes.

Q. They are, in effect, one and the same, one and the same term. Validity encompasses? A. I think job related may be somewhat broader, but validity, but validity presupposes—validity does, indeed, show the test is job related.

Q. Now you used one other term, I don't know whether it was predictability or reliability, or that if I take the test today and I take the same test a year later and about three years later, it would consistently show the same thing. How is that measured, what do you need to determine that? A. The term for that is reliability. One of the best ways of developing reliability is to learn whether the test—whether a person's score on different occasions will be very close to the same score. In other words, if I take the test today and get 120, and I take it six months from now and get very nearly the same score, and that's repeated for several other persons and they all get about the same score, that test would be said [96] to be highly reliably consistent.

Q. With respect to these two tests we're talking about, the Minnesota form board test and the EPSAT test, within the test manual, are there references to studies which have established their reliability? A. Yes, there are.

Q. In addition to some of the documents we've introduced, we've used this term validity and we find reference to two terms, predictive validity and concurrent validity. What do they mean by those two terms? A. Concurrent validity is related to a study wherein the job performance information and the test battery information are obtained concurrently, at the same point in time. So this will usually be a study in which job incumbents are tested. And then test scores related to job performance.

Predictive validity would be the situation, usually, where tests are administered to a group of persons who then are put in a job, or experience a period of time in a job situation, and only at a later point in time would job performance information be gathered. So the correlation is between the prior point in time when the testing occured and the later point in time when the job relatedness was measured.

Q. If you were called upon to pass judgment on a particular test battery, psychological test battery, to determine whether it had predictive or concurrent validity, would it, in any way, [97] assist you in making that determination, if you had the actual test results? A. No, I couldn't tell much from the test results.

Q. Based upon the information, Doctor, that you received from the Detroit Edison Company, was that sufficient information to enable you to form a professional opinion as to whether or not we had a valid test in this case? A. Yes, there was enough information.

Q. What was your conclusion in that regard?

Mr. Ciaramitaro: Objection, your honor. I've let all of this general testimony in respect to what various terms mean, but I do not believe that it's relevant in respect to the issues involved in this case, to know whether the Doctor believes, today, that some tests that are involved in our case, that were given some time ago, may or may not have been valid. The issue before us is whether that

information is required to be submitted to the union in processing the grievance so that it and not somebody else, not the company itself, so that the collective bargaining representative may make its determination as to whether it thinks it's valid.

JUDGE BARBAN: Quite apart from all that, Mr. Houghton, aren't you getting into the very thing that we were taking about this morning, and that is the merits of your controversy with the union? Which is whether or not, in one form or another, those tests are valid. I don't want to have to decide that—[98] that if I do, it might take me much longer on this hearing than I presently am determined to stay. The question you asked goes to the heart of the merit—of the problem between you and the union, but not at all to the merit of the problem before me.

MR. HOUGHTON: There had been some statements or allegations on the record that, in one way or another, I think tended to show, I think, the test was not valid. I would agree with you that whether the test is valid or not is not really the issue before you. And I think that the witness's response to, could he, with the information provided, reached an intelligent conclusion in that regard, is all that we need. We know that with that——

JUDGE BARBAN: You've had his answer.

MR. HOUGHTON: Yes.

JUDGE BARBAN: All right, then I'm going to sustain the objection and you may go on. By the way, Doctor, because I didn't retain it clearly in mind, what was the information you had that you said was enough? For you to make a judgment.

THE WITNESS: I had the validity study.

JUDGE BARBAN: Mr. Houghton, which exhibit number is this? Would you correlate for me?

MR. HOUGHTON: Exhibit 13.

JUDGE BARBANS Doctor said he had the validity study, which exhibit is that?

[99] MR. HOUGHTON: Respondent's Exhibit 13.

JUDGE BARBAN: Thirteen. Doctor, what else?

THE WITNESS: That would be sufficient in and of itself. And I also had information that gave me the background of what had gone on thus far in the arbitration case. I had the initial opinion by Professor Jones of the arbitration decision. I had the one letter, I'm not sure what exhibit that is, that Mr. Houghton had written about the information—about not releasing test information itself. But attached to that letter was detail about how the scoring was carried out—how the statistical weights were derived. Those are the major elements of what I had.

JUDGE BARBAN: Was that General Counsel's Exhibit 8, that last?

MR. HOUGHTON: I think he's referring to——

JUDGE BARBAN: Attached to eight is an explanation of battery weight, loss or items on Minnesota paper form board test and EPSAT test, is that what we're talking about?

THE WITNESS: Yes.

Q. (By Mr. Houghton) As I understand your testimony, Doctor, the only other items that you utilized in addition to what you just explained to the judge—were the test manuals? A. I obtained the test manuals from Mr. Roskind later on and just looked through those very carefully.

Q. And these are the documents, you explained, would be available [100] in any library? A. Yes.

Q. Did you have the tests themselves? A. No, I didn't.

Q. Did you have any need for the tests, themselves? A. I didn't feel I did.

MR. HOUGHTON: I have no further questions.

JUDGE BARBAN: General Counsel?

MR. CIARAMITARO: May I have a few moments, your honor?

JUDGE BARBAN: Yes.

CROSS EXAMINATION

Q. (By Mr. Ciaramitaro) Doctor, a question about these test manuals that you used, did those test manuals that you looked at—referred to—do they refer to any particular job? For example, the job involved in this case, instrument man, being the Detroit Edison Company? A. No, they did not. They refer to a variety of jobs in unnamed companies, where studies had been done.

Q. I may have missed some of this. But some of the things that you go to in a validity study is a job analysis, is that right? That's one of the items? A. Yes.

Q. What would that be? Somebody would go down and watch what a particular job classification does on a typical day, write it all down? [101] A. Well, quite frequently. They would observe them and take notes, as you say and that would be interviewed—interviews with a number of different encumbents, sometimes they might even ask encumbents to comment on ways that they might screw up on the job or ways that they might be unusually effective.

So there are a variety of things—kinds of information, data, that would take place.

Q. Then, after that job analysis, that information gathering is engaged in, somebody gets together to pick out what are deemed to be the very key points on this job? A. I don't think they would tend to narrow it to such a degree. They would try to include as much of the job as possible.

Q. But from this study, the gathering of this information, you try and set forth some sort of criteria, is that right? A. That's right, yes.

Q. And after you get—make these criteria, whoever does it, then it's fixed in his mind, do you try and formulate some sort of test that will draw out—that you think will draw out these criteria, determine whether these criteria will be met with a particular test. A. I'm not—you first try to develop a rating scale made for job performance based on this criteria, so the supervisor can describe incumbents on this various criteria. And then, [102] usually a psychologist or someone who had been working in the area of personnel procedures, would choose some test that would seem to be—that he might guess might be predictive of success.

Q. When you say choose some test, you are referring to some pre-existing test, or would it be some test that that person would himself make up? A. People go both directions on that. Sometimes they do indeed make up tests and try them out. More frequently they would use tests that were already published.

Q. And these tests involve questions, is that right? A. Yes.

Q. So there is a selection of questions. Isn't it possible that sometimes, in formulating a test, you will use some parts of a pre-existing test and then make up others to comply with a whole battery? A. That's right.

Q. You never saw the test, the EPSAT or the Minnesota form board test that they used in this promotional

case, did you? A. I saw the Minnesota form board many years ago.

Q. I mean the one they gave in this test. I understand that there are all kinds of different tests—Minnesota form board tests, different EPSAT tests, depending upon what use this is going to be put to. A. There's only one form to the EPSAT test.

[103] Q. There's only one form? A. There's quite a few forms of the Minnesota test.

Q. Now, the Minnesota form board test that was used in this promotional case, you didn't see the actual one that was used, is that right? A. No, I did not.

Q. Did you ever read any reports as to why the makers of this particular test, that was used in this test, asked the particular questions they did ask. Somebody thought up a question, but did you ever see any reports as to why the person thought up the question and put that question in the battery of test that was given to the instrument man in this case? A. The engineering physical science aptitude test manual was based on a rough analysis of the kinds of knowledge and aptitudes that are believed to be important in engineering and physical clients. So they try to sample these six areas that they thought were important.

Q. So you read studies as to the general category of engineering and physical sciences. But you didn't read anything particularly related to instrument man B classification at the Monroe powerplant of the Detroit Edison Company, is that right? A. Roskind has provided me with that key.

Q. He covered that? A Yes.

Q. In that study, does it say why those questions were used? [104] —were, in fact, used? A. No.

Q. Earlier, in your direct testimony, you were asked to prepare the term validity and job related. And then you said that job related was a broader term, as I guess you use the term, what do you mean it's a broader term? How

is job related different than the way you've been using validity? A. I think some things can be said to be job related though not necessarily be shown to be job related in a statistical study. An obvious example, I guess, would be that—I think medical school education would be related to the job of being a physician, but I'm not sure that I would talk about medical school education being valid, necessarily, to be a physician. It's just, you know, necessary. So I think that job related term can be broad in that it connotes a number of other kinds of prerequisites.

Q. Okay, now let me ask you this question. As you have been using the term, is the meaning of validity included within the meaning job related? A. As I've been using the term validity it is one important part of job related.

Q. Okay, so it's a part of, although not quite as broad as job related? A. Yes.

Q. I'll ask the reverse of that. Is the term job related [105] included within the meaning of the term validity? What I'm really driving at—I'm sorry, I'll let you answer the question. A. Well, a valid test in the sense that we've been talking about it is—it's a sufficient requirement to establish job related. Not always a necessary requirement, but sufficient.

Q. Isn't it possible that something can be job related, as we have been using that term, in the broad sense, but not validity in the statistical sense, as you've been using the term? A. That's possible.

Q. Okay, it would also be—would the reverse be true, that something may be valid or have validity in the statistical sense that you've been using the word, but not job related? A. It would not be.

Q. That's not possible? A. No.

Q. And when you made evaluations of the various information given to you, you were concerned with validity, right? Yes.

Q. You were not really concerned with job relatedness, is that right? A. Well, I was concerned with validity because it meant job related, so I was concerned with both. But job relatedness is an indirect consequence of validity.

Q. In so far as validity is encompassed within the broader term? [106] A. That's right.

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A. There are several different forms.

Q. Did you say EPSAT was all the same? A. It's my understanding they're all the same.

Q. You mean the same questions are always there? A. Yes.

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[108] JUDGE BARBAN: Doctor, I have certain problems. One, the EPSAT test is that a single fixed test? Now I understand that there are different series, but they don't change. For what range of activities are they used to determine whether employees will perform satisfactorily? Is there a fixed type of activity?

To go back with you, I assume you wouldn't use it to determine whether a man was going to be a good doctor, or maybe you would.

THE WITNESS: It might be okay.

JUDGE BARBAN: You mean it could be used for any activity [109] —to determine whether a person would be a good lawyer, a good doctor, a good engineer, a good industrial psychologist?

THE WITNESS: I would not use it unless I had established the validity for those particular purposes, but it does, apparently include some vocabulary knowledge, general science knowledge, comprehension of mechanical principles, and it's possible that if I did a study of, say, successful graduation from medical school, that EPSAT scores would show some modest relationship.

JUDGE BARBAN: Then if I understand you, and I'm beginning to get some insight, maybe very slight, but some, whether or not EPSAT or any similar test has validity would have to be determined by practical testing on people within the area we're talking about. You want to determine whether EPSAT was of any value with respect to doctors, you would have to give it to doctors for a while and see what happened?

THE WITNESS: Yes, that's right.

JUDGE BARBAN: Do we have any evidence, or do you have any evidence that EPSAT was ever administered to people doing the work or the kind of work involved in this case?

THE WITNESS: I don't have any evidence of that sort. I don't remember the manual sufficiently well to be able to say what other settings were cited in the mechanical field.

JUDGE BARBAN: Now there was something else you said that now becomes a little clearer to me. You said you had never seen the EPSAT test and yet you were sufficiently satisfied, [110] without seeing it, that it had validity in the situation involved in this case.

I have to assume, unless you explain to me otherwise, that you are then relying on somebody else's evaluation, who did see the test. Because I can't conceive of a situation in which you can make a value judgment of the value of the test, unless it has been seen—somebody has seen it.

THE WITNESS: I assume it was indeed used by Dr. Roskind in the manner described in the validity study. And the information in the validity study does give a correlation, the coefficients between scores in the EPSAT and criteria of performance in the instrument man job. So that evidence—that correlation is sufficient evidence for me. And my knowledge of the EPSAT is a published test.

It isn't something that somebody put together on an old piece of brown paper. It's a reasonably well known and established test.

JUDGE BARBAN: This leads me to my last question along this line, because this is the inference I had drawn. And if it's a bad inference I would like you to tell me.

I had come to the conclusion that your conclusion as to the validity of this test—it's value—was based on someone else's analysis. That is the validity analysis that was submitted to you, is this correct?

THE WITNESS: That's correct.

JUDGE BARBAN: So that if the validity analysis submitted [111] to you was not, itself, valid, then your conclusion would be not valid. And this is not critical at all. I am just exploring the steps that are involved here.

Now I want to ask you something else. I don't know exactly how to ask it and I am cautioning all counsel that I'm going afield from anything that any of you have asked, so I'm very sensitive to a quick objection.

Up to this point, in your testimony for respondent, and quite properly so, has been directed to the validity of the tests for the respondent, for the company's purposes. That is, as I understand it, they are interested in the test because they want to know whether or not the prospective employee is going to do well if he's put in the job.

You're shaking your head in the affirmative. That means you agree so far. I have a slightly problem and that is whether the employees, generally represented by the union, are entitled to information about their working conditions. Do I gather from your testimony, that you have not, up to this point, been concerned with that factor at all?

THE WITNESS: I guess that's what you gather—correctly I believe. I don't think I would necessarily——

JUDGE BARBAN: I wouldn't ask this question of anyone, but you are an industrial psychologist and I assume you have considered the effects of working conditions from the employees' standpoint.

[112] THE WITNESS: I don't understand. Do you mean physical surroundings? Physical conditions?

JUDGE BARBAN: Let me give you this as an example, because I've had to deal with it. In a somewhat related problem which dealt with piecework pay, and in which the employer had done studies of the employees' activities, somewhat similar to that you describe—except yours is on a much more refined plain. As a result of the employer's studies, the employer established a formula. And in the particular situation in which I am thinking about, the employees didn't know what that pay formula was. It was not revealed to them, and in this particular situation, the employees were much agitated that they were being paid on a formula they didn't understand. Now that's what I mean by part of their working conditions.

And I—my question to you is—your testimony is not addressed at all to the need of the employee to know.

THE WITNESS: It would be my contention, I believe, while I would generally be in support of anything that could be done to explain to employees what the rules of the game are. In other words, how do you go about looking into another job? What do you have to do to get that job? What is this test like in terms of just general nature of it. So, in other words, rules and fair play that relates to treating people humanely rather than in an exploitative way. I would see not giving any formula, concerning the pay formula as extremely self-defeating from the [113] standpoint of any management that did that. Because one of the basic principles of motivation is that the

more people know how to get what they want, the better off they might be and the more effort they might put forth. So I don't believe in secrecy as a policy, or anything like that. I guess I did not give that a great deal of attention.

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REDIRECT EXAMINATION

Q. (By Mr. Houghton) Doctor, so that I'm sure that I understand some of your last responses, I'd like to try and relate your answers to the issue we have before us today.

For example, in making a determination as to the validity or appropriateness of this test, you would need to know such things as scoring formula, would you not? A. No. As to the what?

[114] Q. Scoring formula? A. You mean making a decision about what?

The validity of the test itself. A. No.

Q. How the tests are scored? A. No, I wouldn't need to know that. As long as I knew that they were related to job performance.

Q. Now, do you recall, Doctor, when I spoke to you earlier and I asked you to assume you were retained by a union and the union said "our boys have to take this test battery and we're concerned as to whether or not—if they had access to the tests themselves, it would in any way assist us in representing the people, if it would in any way assist us in understanding the test. If it would in any way assist us in determining whether the test is valid or not".

Do you recall that? And what is your answer to that question?

MR. CIARAMITARO: Objection, your honor, it calls for a conclusion and the conclusion is not within the witness's expertise and it is irrelevant.

MR. HOUGHTON: I believe it is within the witness's expertise. It's certainly within this man's expertise as to whether or not having the actual tests would in any way be a guide to further understanding the job or the way in which the test is administered. Or whether the test is a good test or [115] a bad test or a valid or an invalid test.

JUDGE BARBAN: That wasn't your question if I understood it. I thought your question was whether or not having this—having the test itself would be necessarily relevant to the union's ability or right to represent people.

Well then, I'll sustain the objection because I think that that's not the question.

MR. HOUGHTON: I don't believe that's the question I asked.

JUDGE BARBAN: I know. I'm saying that—strike all that. Would you repeat your question?

My question is this, Doctor. In your opinion, would the union's having copies of these actual tests, in any way assist the union or its experts in understanding whether or not the test is, in fact, valid?

MR. CIARAMITARO: That's what I'm objecting to. That question which calls for that opinion as to whether it would be beneficial, not for him or for Edison, but beneficial to the charging union and its agents. I don't think that is an opinion he could give.

JUDGE BARBAN: I'm having trouble. Read me the question again.

(The pending question was read by the reporter.)

JUDGE BARBAN: I will take the testimony as opinion evidence from a person qualified.

THE WITNESS: My response then, would be that I would not [116] regard the test as helpful to me in making that judgment.

JUDGE BARBAN: But, Doctor, is that because you have the analysis that somebody else made? I thought that was your previous testimony.

THE WITNESS: No, if I were in the position of wanting to know about the test I would ask for the statistical information rather than for the test itself. I would not rely on my judgment simply from looking at the test.

JUDGE BARBAN: But you are, as I understand, discounting the value of looking at the test at all. That was the question.

THE WITNESS: Right.

Q. (By Mr. Houghton) In other words, Doctor, so we understand. Assume you were asked to pass upon the validity of this test battery. Someone gives you all the information and the Edison has already given you—and then says "would you like the actual tests themselves".

As I understand your testimony, you would not need those tests. A. That's correct.

Q. Now let's contrast that and if I may tell what may be a bizarre example, would having those actual tests in front of you—in order to formulate your opinion—be any more valuable than, for example, having a copy of Life magazine? A. That is somewhat bizarre, but I guess I would not find that any more helpful.
[117] Q. In other words, it's irrelevant to what you're trying to do, isn't it? A. In terms of the kind of validity that we're talking about, that's right, it's irrelevant.

Q. Now I want to make sure we understand this. We're talking about psychological aptitude tests here. Now if,

for example, we had a test that was designed to measure job knowledge. I take it your answer might be different? A. Yes, it would be different.

Q. And in a job knowledge type of measuring test, you most surely would need to see the text? A. Yes.

Q. Right. There was one other concept I wasn't sure we had fully in mind, and that's this example. The concept, rather, of a cutoff score. If, for example, someone were to give you the actual tests, would you be able to look at those tests and say these cutoff scores should be such and such? A. No, I couldn't.

Q. How do you determine what the cutoff score is? A. You'd have to have a validity study and you'd need to contrast successful performance on the job with less successful performers and then compare the test scores that they had received, in order to establish a cutoff point.

Q. And to determine that cutoff score, as I understand it, you'd utilize a scatter plot of some sort? [118] A. Yes.

Q. And then what would you do once you had that? A. Well, I would generally try to maximize the number of correct predictions of the test scores so that I would have the cutting score set at a point where selecting persons would result in the least loss of potentially good persons and rejected persons—I should have said it just the other way around. And selecting persons would result in a minimum number of persons who failed. And rejected persons, at the same time, would result in the minimal reject of persons who might otherwise have been successful.

Q. Did I understand that you make that type of decision without reference to the test itself? A. Yes.

Q. I don't think we need to go through this validation study in all it's detail, but I wanted to make sure we weren't under any misunderstanding. You were asked a question as to whether or not you knew if this test battery had ever been used in connection with the instrument man B battery job. As to whether it has or not and as to

whether it's been correlated in the job, don't you get that information from the validity study? A. It tells me in the validity study that this can be the case. I don't have an affidavit to justify that inference, but I certainly would make the assumption that everything that is portrayed in here is true.

[119] Q. Now assume, Doctor, you wanted to go the next step behind this validity study. Do I understand you that to take that step you might take this step, but you might go to the supporting information that made up the validity study? A. Yes. I'd like to see, perhaps, more detail, tabulations, statistics and perhaps more of the correlational data, but that would be my next step.

Q. Now the supporting document that would be behind the validity study, that would be not—would include the tests themselves? A. No.

Q. You were asked at one point during the cross examination, whether you would be at all concerned in finding out why the particular questions that were used in the test were used? Is it important to you in rendering or making your validity study, why a particular question is used? A. No, it isn't.

MR. HOUGHTON: I believe that's all I have.

MR. CIARAMITARO: One or two questions, your honor.

REDIRECT EXAMINATION

Q. (By Mr. Ciaramitaro) Doctor, if one were to give a different battery of tests—that is different questions—for the same purpose as involved in this case, promotion to an instrument man classification. Would you expect that a validity study would come out identical to the one that we do have. Or [120] would you expect differences in the results of the study? A. I would expect some differences?

Q. So the result of a validity study will depend on what battery of what questions are asked, is that right? A. That's right.

MR. CIARAMITARO: That's all.

MR. LEWIS: No questions.

JUDGE BARBAN: Doctor, if you will, put up with me just a little bit more. I am not at all sure whether there's been some change in position here or whether I'm not astute enough to understand what's going on—the latter is quite possibly true.

I originally understood you to tell me that basically you did not need to see the tests themselves because you were relying on the evaluation of the tests made by someone else. Is this correct?

THE WITNESS: I would usually—well if I did not know the evaluation made made by someone else, I would still not find tests themselves useful in trying to evaluate whether they were any good or not. The only kind of information that I would find helpful would be a statistical evaluation, or knowledge that might be gained from the test manual and, I guess—I'm not sure I would ever really feel that I coul gain from examples of the actual tests.

JUDGE BARBAN: I now understand you to say that what you [121] are telling me is that you're more interested in the results of the past use of the tests than you are of the contents of the tests?

THE WITNESS: That's right.

JUDGE BARBAN: Do You—and are you also telling me—because this is a question that was asked you—that therefore, this is not exactly the question that was asked you, but it's a question that troubles me. Are you also saying that therefore, the contents of the tests, could not

be of any value to a union representative in representing his people who were concerned by the test?

THE WITNESS: I think I'm saying that, yes. I would not see that as anything other than a kind of curiosity. I mean satisfying of one's own curiosity. I wouldn't see it as a way of evaluating the wisdom of the use of that test.

JUDGE BARBAN: Going back to another matter we discussed earlier. The need of the employees to know—that does not weigh in to this situation at all, then, from your point of view?

THE WITNESS: Not in this instance.

JUDGE BARBAN: Would you explain why not in this instance?

THE WITNESS: Well I don't mean this Detroit Edison, I mean not in this instance in terms of the whole picture of psychological testing.

JUDGE BARBAN: Since I'm taking opinion testimony from [122] you, here we have a group of people—leave Detroit Edison out of it, although this is apparently the situation here—we have a group of people who are seeking a promotion which, apparently is guaranteed to them by the union contract, who are complaining that they weren't given the promotion. And the union contends here that they can't find out the details why, one of the details being the tests that were given to them.

And I am taking from your testimony that it is not—it would not be necessary for the union to have this kind of information to represent those people.

THE WITNESS: That's correct. I would—I think the problem will be—well we couldn't give the test items to potential examinees, because then the tests would quickly become worthless.

JUDGE BARBAN: Is that the reason for your—I'd like to have your reason.

THE WITNESS: That would be the major reason. The security of the test demands it not be part of the public domain.

JUDGE BARBAN: That was the reason Mr. Houghton gave quite early in the hearing—basically if the tests were revealed, that its usefulness would be at an end. Is that the basic reason for your answer to me?

THE WITNESS: That's the basic reason. And a supplimentary comment would be that being aware of the kinds of items in the [123] tests, the general nature of the tests' framework would be useful. But this would not depend upon giving the test itself—the actual content of the test to anybody.

JUDGE BARBAN: Thank you very much. Any questions?

MR. CIARAMITARO: No, your honor.

MR. HOUGHTON: Just one.

FURTHER REDIRECT EXAMINATION

Q. (By Mr. Houghton) At your last answer you said it might be helpful to have types of questions. Did you mean helpful in satisfying this concept of curiosity? A. From a public relations example.

Q. That's what you were referring to? A. Yes.

MR. HOUGHTON: That's all I have.

JUDGE BARBAN: You're excused. Thank you very much.

(Witness excused.)

JUDGE BARBAN: Off the record.

(Discussion off the record.)

JUDGE BARBAN: Back on the record.

MR. HOUGHTON: I call Dr. Roskind.

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified, as follows:

DIRECT EXAMINATION

JUDGE BARBAN: Please be seated.

[124] Q. (By Mr. Houghton) Dr. Roskind, your full name, for the record? A. William L. Roskind.

Q. Where do you reside? A. 27310 Aberdeen, Soughfield, Michigan.

Q. Are you employed? A. I'm employed by the Detroit Edison Company.

Q. What is your position with the company? A. I am the director of industrial psychology.

Q. How long have you held that position? A. Since September the third of this year.

Q. Prior to the September third, what was your position with the company? A. I was the acting director for three weeks. Prior to that I was the administrator of psychological services.

Q. Back at the time the tests were given—that are involved in this case—what was your position with the department? A. I was working with this department as a research psychologist.

Q. Did you yourself personally take part in any way in the administration of this particular test battery? A. I was in on some of the preliminary meetings relative to the development of this test battery and worked on some of the research and suggested the criterion rating scale that was used in this study. And helped with some of the statistical analysis.

[125] Q. Is that the statistical analysis that was embodied in the validity study? A. That's correct.

Q. Do you yourself have knowledge as to the way in which this test is administered, how it's scored and that sort of detail? A. Yes, I do.

Q. And do people work for you who have access to the actual company records involving the administration of this test? A. Yes, the individuals who administer this test, work with the records, report to me.

Q. All right, now I'd like to look back—and remind you Dr. Roskind, ask you, first of all, when were psychological aptitude tests first used in the company. When were they first used. A. They go back probably some forty years to, I think, 1932, when one of the first psychological aptitude batteries was used in the selection of men from one of the trades jobs.

Q. Now back in the 1930's, was that prior to the time the union represented employees of the company? A. I don't know what time the union began its representation of the employees.

Q. As a note here, we'll refer the arbitrators to the collective bargaining agreement which sets forth the certification dates of the various units and they began, I believe, in 1941.

JUDGE BARBAN: I think you were referring to me as the [126] arbitrator. I am not. Go ahead, I'm just a——

MR. HOUGHTON: It's getting late in the day.

Q. (By Mr. Houghton) Looking at the particular job we're involved with today, instrument man work. When were psychological tests first utilized for entrance into that job?

MR. CIARAMITARO: Objection, your honor. I've left several questions along this line. I'm not sure—I doubt and I believe it's irrelevant as to when psychological testing began in general or in specific in respect to this case. When it began is irrelevant.

JUDGE BARBAN: Was your last question concerning instrument men?

MR. HOUGHTON: Yes, this particular job, this work.

JUDGE BARBAN: Objection is overruled.

THE WITNESS: As a part of the study on the selection of powerplant operators, it became apparent that many of the operators were moving into the job of instrument man. And so at the same time that that study was investigated back in 1958, this test battery was developed—instrument test battery was developed in use for the selection of instrument men.

Q. And it's been used since that date, to this time? A. That's correct.

Q. You've stated that the actual tests themselves, in this case, are kept in confidence. I'd like for you to explain to me, for example, how these tests are utilized by the Edison [127] Company. For example, if you proposed to give this test battery to certain of these prospective applicants, what measures are taken to keep the tests confidential? How do you go about keeping copies of the tests and giving them to the people to be administered? A. When individuals are scheduled to take the tests a sufficient number of copies of the tests are taken out of a locked file and taken into the testing room where the applicants are already seated and standardized instructions are given to the applicants or employees as to what is expected of them during that testing situation.

The instructions for a specific test and samples are given to them so they know what kinds of problems they're going to be working. While they're taking the tests, tests are passed out to each of the individuals and as soon as the test is over with, as soon as the standard time is up, the tests are collected and taken out of the testing room and refiled in a locked drawer.

So that—and there's an accounting system whereby we keep track of the number of tests we take into the room and we take out. A test is collected from each person.

Q. What would happen, for example, if I had come to you and said I'm a supervisor of the instrument men and I'd like to see what this test is you're giving to my men. Can I have a copy. [128] A. Well, I'd ask you why you wanted to take a look at the test and what was it you were interested in and discuss the test and the aptitude that the test measures, with you, to help you understand it. But, no, I would not show you a copy of the test.

Q. Are these tests disseminated to management? A. No, management of the company does not have access to the tests.

Q. Are you familiar, Dr. Roskind—and by the way, digressing for a moment, I don't think I can establish this. Do you have a doctorate in the field of Psychology? A. Yes, I do.

Q. Are you familiar with the ethical standards of psychologists? A. Yes, I am.

Q. Would you tell me where they come from? Who they are applied to? A. The ethical standards were created by the committee working for the American Psychological Association in an attempt to protect the general populace for whom psychologists work and also to protect the American Psychological Association of Practising Psychologists from unethical behavior.

Q. Now are these standards binding on all psychologists? A. Yes, they are.

Q. Are they the same throughout the country? A. Yes. [129] Q. Within the Detroit Edison Company, Doctor, were you the one who made the decision that these particular tests should not be given to the union? A. I'm the one that's responsible for that decision.

Q. And will you tell us why you made that decision in this case? A. From one standpoint we have the ethical standards which forbid the dissemination of psychological aptitude tests to laymen or to people who are not professionally qualified to use the tests. And second of all, we have the problem, the very, very practical problem of test

security to the extent that if the tests were disseminated and if they became general knowledge, employees who were interested in bidding on the job of the—the instrument man job, then it would destroy the validity of our selection process.

And, if we weren't aware of it, we would be selecting people for that job, who stood, possibly very little chance of being successful on that job. And, furthermore, it would be inappropriate in terms of all the other people who were using those tests. Those tests are used throughout the country and it would be unfair to anyone who's gone through the trouble of validating a test battery including those tests.

Q. To clear up one point, this EPSAT test that we refer to, is there only one form of the EPSAT test? A. There is only one form of the EPSAT test. It does not [130] have any parallel forms.

Q. What about the Minnesota form board test? A. The Minnesota form board has several parallel forms, equivalent copies of the tests which serve in each other's place, but do not have identical items on each test.

Q. If you validate, for example, the test sample was validated in this case. Do I understand you to say you could then substitute some other form of the Minnesota form board test and give it to Edison employees for other evaluations? A. Not exactly. You'd have to do some additional research to make sure it was operating as to parallel form. It would generally accepted as a parallel test, but it is not exactly the same. You'd have to re-normalize the data. We establish norms, not additional research.

Q. With respect to the Edison, you use only one form of the form board test? A. That's correct. Every person that takes that test for that job takes that one form of the test.

Q. To make sure we understand this concept of validity, supposing you have a job—and I'll call it a crane operator—and you read some articles in the field of say, a perfectly wonderful test that's been developed to determine whether people are going to be good crane operators, do I understand that even though you would have that literature, before you would actually give that test to Edison people, it would be necessary to [131] validate that test with respect to the particular job? A. That's our policy within the company. We do not accept validation studies done by other organizations, for use in our own company. Because to a large extent, job titles will carry the same title from company to company, but they may, in fact, have critical incidents, critical facts that will be different. And without a careful analysis of the job and a statistical analysis to see whether, in fact, that particular test will predict successful performance on that job, it would be inappropriate to use that test as far as our people——

Q. All right, now let's look at this validation study that the Edison Company performed with respect to this test battery and I believe it's Respondent's Exhibit 13.

But let me ask you this question first. In preparing the validation study, someone sits down and says all right I've got to determine whether this test battery is valid with respect to this job.

Would it in any way be necessary for that person to utilize the actual tests themselves? A. No, it would not.

Q. What would he do? A. The individual would look at the validation study itself to see the relationship.

Q. Excuse me, I'm going a step further. I'm saying there [132] no validation study. Someone is now going to sit down and put together a validation study to validate the test in the first instance. In that situation, would he, in any way, have to utilize the actual tests themselves? A. No, that wouldn't serve any purpose. It would be more appropriate to look at the various test manuals and to go

through the literature and look at other research that's been done. Assuming that you were about to develop a test battery, you would have analyzed the job. You would have some hypothesis about which aspects of the job, which aptitudes can be measured, which aptitudes would, in fact, predict successful performance on the job.

You would then go to the catalogues of tests by research and so on, and look for tests that would measure the aptitudes that you were interested in, the aptitude that you hypothesize is relevant to that job.

Q. So we understand, assume again I have this crane operator job, assume hypothetically there are a hundred different aptitude tests available? I suppose I could start with the first one and go through all one hundred and perform validation studies for each of the tests and then pick the one the most appropriate and suited to my purposes. A. That would be very inefficient way of doing it, going through each one, one at a time.

Q. In layman's terms, do I understand you to say in determining which of those tests you want to validate, you use the [133] test manuals and attempt to isolate those tests which you think will be predictive. A. That's correct, yes.

Q. And then, before you actually decide to use them, you do in fact run a validation study? A. You run a complete research program to determine in fact whether those tests will predict performance on the job, before you actually start using those tests for selection.

Q. And, again, in running a complete research form, the complete research task, would you have any need to actually use tests themselves? A. You would use the test in terms of administering to people but it would not be necessary for you to sit down and look at copies of the tests other than to satisfy your curiority.

JUDGE BARBAN: The point is, as I understand it, you validate by giving the test to people and checking those people statistically, or am I wrong?

THE WITNESS: If I may rephrase that, I'd like to explain to you what it is that we do. If we have——

JUDGE BARBAN: That's what counsel seems to be asking.

THE WITNESS: If we have a number of crane operators working for us at the present time and we want to develop a selection battery for selecting future crane operators, we would analyze the job of crane operator and we would develop a rating scale and evaluation to find out who it is that can do [134] do the job well, who can do it on an average level of performance and who is actually doing the job so poorly that if we could, we would prefer not to select any additional men like those who are performing poorly. Having that rating scale and being able to designate which are successful crane operators, averaging poor operators, based on actual performance on the job, we would ask that group of men to come in and take this battery of four or five or six aptitude tests that we hypothesize will, in fact predict their performance.

We might administer four or five tests and, in the research discover that really only two or three of those tests will predict performance. And we made a bad guess on one or two or three or those tests.

JUDGE BARBAN: You would give all of the tests to all of the men?

THE WITNESS: All the tests. Say if we picked out six tests, we would hypothesize would, in fact, produce performance. And in running one of these validity studies as is described in this exhibit number R-13, we would determine which tests actually do predict performance. Which ones will, in fact, predict the high performance individuals and which the low performance.

And then, those tests, but only those three that in fact did predict performance, would be used in the future. And after a few years a follow-up study would be done to

see if the new [135] people would have been selected using that test battery and are in fact performaing the job successfully.

JUDGE BARBAN: Originally those tests on which the poor performance did poorly and tests on which the good performers did well, would be your predictive tests. Is that a correct point?

THE WITNESS: Those tests on which the poor performers did poorly and the high performers did well, would be the tests that we would select for use in selecting batteries for the future.

JUDGE BARBAN: Thank you. Mr. Houghton, I'm very sorry to have interrupted, but I wanted to get some detail.

MR. HOUGHTON: That's entirely all right.

Q. (By Mr. Houghton) Mr. Roskind, so I understand this, again, from a layman's standpoint. If you were to tinker with test batteries and try and make a test battery more predictive and you find, for example, one test was actually exercising a negative function, that it was counter productive and if it was depressing other tests that might be successful predictors, you then eliminate the bad test, is that right? A. That's correct.

Q. Is this sort of thing what's encompassed in making the validation study, in determining what is and is not an appropriate test battery? A. Generally yes.

[136] (A document was marked Respondent's Exhibit No. 20 for identification.)

Q. I hand you what has been marked proposed Employer's Exhibit No. 20, and ask you if you can identify that? A. This is a copy of the ethical standards of psychologists.

Q. And are these the standards that are in effect and have been in effect at all times pertinent to this case? A. That's correct.

Q. And do these standards contain the ethical standards you referred to earlier, regarding the release of testing information? A. Yes, they do.

Q. Which standards are those, by number? A. In terms of the principle of test security, that's principle number 13 of the ethical standards.

Q. And what about test interpretation, what principle is that in? A. That's principle number 14.

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[137] Q. (By Mr. Houghton) Dr. Roskind, with respect to the results of tests, when employees take tests and they have the results recorded in the company records, what efforts, if any, are made to keep those results confidential? A. Those records are locked in a locked file cabinet in our office and only several individuals who have a need to know have access to those records. The scores are considered highly confidential and are not discussed with anyone that does not have specific need to know. And that's a very limited group of [138] individuals.

Q. Who would be encompassed in that group? A. The people that work directly for me have access to the actual scores in terms of doing some of our research work. Two, the people who administer the tests, and one or two of the psychologists that work with us. But no-one outside of our group has access to the actual test scores.

No-one other than professional psychologists.

Q. All right, if I were a supervisor, a member of management and I came to you and I said I want to see how my people scored, give me their test scores, what would you require? A. It's not a question of requiring anything. You would not have access to the actual scores by names of employees. Regardless of whatever reason you gave me. The only people outside of our group that get any information at all are the interviewers, who are partially responsible for making selection decisions. And all they get is a general evaluation of the person's performance.

In most cases, as we're talking in this test battery, either the individual has met the standard for the test battery or the individual has not met the test standard.

But in terms of the numerical score or the raw scores or the scores on the individual tests, the test battery in parts, that information is not given.

Q. What if I came to you and I had a signed release by three [139] of my employees, giving you written authority to give me the actual test scores, what would happen? A. I don't think I would accept that either, Mr. Houghton, if the employees came to me and told me that they had some reason why they wanted you to have their test scores and if they signed a release that I had prepared for them, then I would, in fact, give you their test scores if that's what they wanted.

But outside a signed release I could not do it. I would be opening myself up for a suit if the test results were misused. And it would be against the ethical standards of psychologists.

We found that it's actually destructive in a company. When this occurred many, many years ago, before this practice was put into effect, several individuals whose test scores were known to themselves and other individuals that worked with them, were harrassed so much and called stupid and dummy and so on, to the point where they actually left the situation. They quit their job with the company because of harrassment.

In order to protect employees from that type of harrassment, we will not give the test scores to anyone at all without a release of that individual, if the person has a need to know.

Q. I'd like to turn to another area, Dr. Roskind, and that has to do with the administration of the tests themselves. Are the employees given any initial instructions or

reference [140] guides when they sit down and take these tests? A. When an employee sits down or an applicant sits down and takes the tests, they are given ground rules as to how we operate. They are told approximately how long the test battery is going to take, the kind of tests they'll be taking. They are asked whether they have any questions or problems, or where they are parking their car. We don't want people starting a test under any unusual or additional stress.

And then they are told that the tests—how the tests will be used, how the results will be used and that is that the test results will be compared to other individuals who already took the test in the company, and compared to their performance—that they may be used in an additional selection process. And most important of all, that their test results will be kept confidential by our group. And that those test scores will not be released to anyone. Only an interpretation of the overall performance.

(A document was marked Respondent's Exhibit No. 21 for identification.)

Q. Dr. Roskind, I hand you what is marked Respondent's Exhibit No. 21 for identification, and ask you if you can identify that for us? A. This is our copy of the introduction to testing that is read to all applicants when they come in and sit down, and employees, when they come in and sit down to take the test, And, the point [141] that I mentioned earlier, the statement that the test scores are confidential, relates to this particular principle where we are able to give people who have need to know an interpretation of the overall performance, but not the numerical score. That's what the applicants or employees are told.

Q. And are these the instructions that are told to the applicants taking the instrument man test battery? A. Yes, they were.

MR. HOUGHTON: We would offer the exhibit.

MR. CIARAMITARO: No objection.

JUDGE BARBAN: Mr. Lewis, any objection?

MR. LEWIS: I don't think so. Is this the same one that was put in at the other?

MR. HOUGHTON: Yes.

MR. LEWIS: No objection.

JUDGE BARBAN: Respondent's 21 is received.

(The document heretofore marked as Respondent's Exhibit No. 21 for identification was thereupon received in evidence.)

Q. (By Mr. Houghton) All right now, in terms, Dr. Roskind, of scoring, let's just assume a group of people sit down and take the test battery, what types of answers are they putting down on paper and how are these answers scored? A. After looking at the question in the test battery, or the tests themselves, they read one of anywhere from two choices, [142] to one of the possibly five choices. And they select the choice they think is most appropriate for the question. Then they go to a separate answer sheet and mark that answer on the answer on the answer sheet with a pencil by marking an area between some dotted lines. That indicates the answer to that question.

Q. And then when one of these answer sheets is filled out and turned into the company, how do you go about checking or scoring such an answer sheet? A. A key designed for that test, produced by the manufacturer is placed over the answer sheet and the number of correct responses is counted. Prior to that the answer sheet is screened to see whether individuals have possibly marked

more than one answer to a given item. And in some cases an additional key is placed over the answer sheet to determine the number of wrong answers.

Q. Is there any subjectivity involved in the scoring operation? A. It would not matter who did the scoring of the answers. If they were done properly different individuals would arrive at the same scores. So we call that an objective scoring procedure rather than a subjective scoring procedure, when different people might evaluate it differently.

Q. Suppose I'm scoring this test and I find an employee has put down marks in two boxes for the same question. Am I supposed to try and decide which box he intended to blacken or how do you handle that? [143] A. The individuals that are taking the test are informed ahead of time that if they, in fact, mark two responses to one item that they receove no credit for that item. It's counted as wrong.

Q. And have you, in the past, Doctor, explained this scoring and its principles involved, to people? A. Yes, I have.

(A document was marked Respondent's Exhibit No. 22 for identification.)

Q. Dr. Roskind, I hand you what has been marked Respondent's Exhibit No. 22 and ask you if you can identify this for use? A. This is a copy of the answer sheet for the engineering and physical science test. We've been referring to it today as the EPSAT test.

Q. And is that the sheet upon which the responses would be recorded? A. That's correct.

Q. And that is an example of the actual scoring sheet for the test given in this case? A. This is an answer sheet that would be used, yes.

MR. HOUGHTON: We would offer it.

MR. CIARAMITARO: No objection, your honor.

MR. LEWIS: No objection.

JUDGE BARBAN: Respondent's 22 is received.

(The document heretofore marked as Respondent's Exhibit No. 22 for identification was thereupon received in evidence.)

[144] (A document was marked Respondent's Exhibit No. 23 for identification.)

Q. Dr. Roskind, I hand you what has been marked as proposed Respondent's Exhibit No. 23 and ask you if you can identify that for us? A. This is another answer sheet that is used with the revised Minnesota paper form board test. And it is an actual answer sheet that's used in practice.

Q. Now you say used in practice. You mean this would be an answer sheet that would be actually used when the test is given? A. That's correct.

MR. HOUGHTON. We would offer this exhibit.

MR. CIARAMITARO: No objection, your honor.

MR. LEWIS: No objection.

JUDGE BARBAN: Respondent's 23 is received.

(The document heretofore marked as Respondent's Exhibit No. 23 for identification was thereupon received in evidence.)

(A document was marked as Respondent's Exhibit No. 24 for identification.)

Q. Dr. Roskind, I hand you proposed Respondent's Exhibit No. 24 and ask you if you can identify that? A. This is a copy of an answer key for the engineering

and physical science test that I had prepared specially for this hearing. It is a replica of a key—in that it is not the [145] actual answer sheet that is used, but it is a copy of what the key would look like.

Q. And how is that key used by the company in scoring an answer sheet? Could you show us please? A. I don't have an answer sheet with me. The answer sheet is placed—the key is placed over the answer sheet. It can be lined up and then it's a simple process of looking through the key to the answer sheet to see which answers have been left blank in order to obtain a count of the correct responses to the items of the test.

Q. And is a similar type key used for scoring the paper form board test? A. Yes it is.

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[146] CROSS EXAMINATION

Q. (By Mr. Ciaramitaro) Dr. Roskind, you've explained how the cover sheet is set over the test sheet or test paper. These are checked manually, I understand, by a checker? A. Yes.

Q. A human being? A. Yes, normally twice.

Q. Pardon me? A. Normally twice.

Q. Does the same person check it twice or does it go to somebody else to check? A. Normally it's checked by the same person.

Q. And that same person checks it twice? A. That's correct.

Q. And the result of his checking is recorded where? A. On a test record card, on the answer sheet itself.

Q. So the checker will put down how many right answers? A. I'm sorry. It is reported on the answer sheet itself and then a clerk—your question was where is it recorded?

Q. Right. A. It is reported on the answer sheet itself.

Q. Now looking at this example where the cover sheet is superimposed over the answer sheet? Check me, whether I'm right or wrong—on the examples that you have? Well, as I look at it, I can only see one possible for each question. If I look [147-A] through that hole I can only see one double-dotted line. Is that right? A. Yes.

Q. Now, you indicated before, maybe sometimes a person may give two answers to the same question. A. Yes, sir.

Q. How is the checker going to see that by superimposing the cover sheet over the answer sheet? A. Okay, I also stated that prior to placing the key on the answer sheet, the answer sheet is looked at to see whether or not an individual has, in fact, recorded two responses to a single item.

Q. Okay, so the checker will do that first before he puts the cover sheet over it? A. That's correct.

Q. Dr. Roskind, after the checker checks it the two times, is there ever any further review as to whether the checker made any mistakes? A. There are, from time to time, additional reviews, it is not a systematic procedure as such. If a question comes up the answer sheets are normally held for a year. And if any question comes up they can be reviewed.

Q. Has it ever happened, in your experience, where tests have been reviewed in this fashion? A. Yes.

[147-B] Q. Have mistakes ever been discovered? A. From time to time, yes. Yes, I guess, yes. We have to discriminate. First we make a count of one wrong or two wrong.

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Q. Now the custodians of the results of the papers themselves, is it the psychology department? A. That's right.

Q. And then at the employment—someone, some employment department personnel wanted to know what the scores were, they [148] would have to go to the psychology department and request them, is that right? A. That's right.

Q. Assuming that person had been determined to have access, the psychology department would then give that information, is that right? A. The information would be given in terms of whether or not the person met the standards for that test battery or not, not the test scores.

Q. So even your own employment department isn't told the individual's test scores? A. That's right.

Q. And what if—and if they were to ask for a comparison between one individual and another individual. What—would you just say one got higher than the other? Or would you not say at all? A. Well we've had this conversation with them in the past and they understand that once we set a cutting score, people either meet the standard or fail to meet the standard. And, in which case, they don't ask us which of these two people got the highest score. They don't feel that our tests are such that it's appropriate to make that kind of comparison. If two individuals have the minimum necessary qualifications, then, in fact, we consider them both qualified. And the recommendation is such that these people are acceptable according to the test battery. [149] And so we do not make those comparisons for the empoyment department.

Q. So it's just acceptable and not acceptable? A. The term we use is acceptable and not recommended.

Q. So if an employee came up and said I can't believe that guy got a higher score than I did, you're not going to tell him both scores, you're just going say he got acceptable and you got not recommended. Is that right? A. Well, with the employee came in to see me I would sit down and go over that employee and give him a much more detailed analysis of his test performance and go into actual scores if that would be helpful, and show him where

his scores stand, compared to the norm group that we have. Whether he is high or low, relative to all of the employees who have taken that test. But not relative to any individual that has taken that test.

Q. Not only would you handle an employee that way, the same would go for the union, is that right, an employee representative. You wouldn't even go into some of that depth with an employee representative. Is that right? A. With the employee representative?

Q. Yes, for example, like Mr. Lewis? A. Not unless an employee had authorized me to do that.

Q. You referred to an experience same time ago—I don't know—you had a problem with people being harrassed because their scores became known. Is that right? [150] A. That's correct.

Q. Now what group of people were being harrassed, the people who flunked the test? A. Yes—by other people who had taken the test.

Q. These other people who harrassed them were those the people who passed the test? A. Yes.

Q. So it was those who passed who were harrassing those that flunked, is that right? A. Well I'm not really that familiar with it. I shouldn't really say that. That was my understanding, but I'm not really sure of that detail. I think I can safely say this, it was someone who got a higher score than someone else, harrassing the one with the lowest score.

Q. At least that? Now you've indicated that the battery of tests that were used in the instrument man—that battery of tests, had that same battery had been used for how long? A. This battery was developed in 1958 and has been used continuously since then. There have been some modifications to the battery. Modifications took place in 1970.

Q. When you say a modification, a change in a question? A. No. A change in—not the scoring procedure, but the arrival at the acceptable, the cutoff point.

Q. Okay, but the same questions have been used since 1958? A. In one of the tests, one of the entire tests—there were [151] three tests used in the test battery prior to 1970 and two tests used after that time. A research study was done at that time that showed that the third test was not making a significant enough contribution to warrant continuing its use.

Q. Okay, of those two tests that you continued over—— A. Yes.

Q. ——after 1970, did those two tests continue to contain the exact same questions as had been used from 1958 to 1970? A. To 1974.

Q. So there were no change in questions? A. That's correct.

Q. At least in those tests? A. That's correct.

Q. And the third one was dropped altogether? A. That's correct.

Q. And to your knowledge, Dr. Roskind, has this been the first time that the union has requested these tests? A. This particular case is the first time that the union has requested tests.

Q. Instrument man B tests? A. Yes, relative to PMO-123.

Q. You mean to say they've asked for the instrument man B battery of tests before? In any other context? A. I'm sorry. I just wasn't sure what your question was. In other words, not relevant to our case today at this point in [152] time. But since the beginning of the arbitration case of PMO-123, after the third step grievance, when Mr. Lewis became involved.

Q. But I'm saying this is the first time the battery of tests used in the instrument B situation. The battery has been in use since 1958. This is the first time that such batteries have been requested by the union? A. What do you mean by "this"? This time, yes.

JUDGE BARBAN: He apparently means this particular instance is the fisrt instance in which the union has requested this.

THE WITNESS: Yes.

Q. (By Mr. Ciaramitaro) Now a couple of questions on validation studies. In your experience as—have you ever made two validation studies of the same test? A. Have we ever made two validation studies of the same test?

Q. Yes. Let me try to clarify that for you. Have you ever had a test where Detroit Edison would go in and make their own validation study and only Edison personnel participate in the validation study, and then have that same test be validated—a validation study being engaged in by an outside group? A. I guess that has occured.

Q. Has it occured once or more than once? A. There is only one instance of it, but it involved sixteen test batteries.

Q. In that instance, did the validation study come out identical? [153] A. The validation studies were not identical to start with and therefore did not come out identical.

Q. Now let's see if I can think of one way in which a validation study would differ. Would it differ in the job analysis and—for example—if an Edison person looks at a job he will see certain things. A different individual looks at a particular job, they may see something else, is that right? So that's one way in which a study will differ, right? A. Yes.

Q. And that could lead to a different result. As I scan over the R-13, it indicates some interviews of supervisory personnel were engaged to try and determine what the criteria were, how they had evaluated specific individuals, is that right? A. Yes.

Q. I assume correctly that if somebody else had engaged in the interviews, that that could also lead to a different result from the validation study? A. That's correct.

Q. And it would also be true if different test questions were used, you could expect a different result in the validation study, is that right? A. That's correct.

Q. And we've used the term evaluations of job performances as part of a validation study. These evaluations, are they [154] made by supervisory personnel, those who are watching the instrument men at their job? A. Yes, they are, that's the way it's done.

Q. Are those totally objective evaluations or does the subjective enter into it? A. That's always a problem in a validity study and an awful lot of effort goes in to making those evaluations as objective as possible. And I could give you several examples of how that's done.

Q. Yes. A. First of all, we don't ask for evaluations like do you like the guy or does he bowl well or do you get along well with him or something like that, or does he cause you a lot of trouble. We look for, in fact, measures, and we try to get as hard a measure of the actual job performance as is obtainable.

We ask very very specific questions. To what extent can this man do this particular task? That is part of this particular job, rather than how well do you like him or how good an employee is he? We are trying to find out how well, in fact, he'll be able to perform that job. If there are actual measures available and if you would have—as you would have if it's a production job, by the number of pieces turned out per hour, the amount of scrap used or something ike that. You would also want to look at those kind of indices to get a measure of performance on the job. And then you have to very carefully instruct [155] and coach the supervisors as to the kinds of errors that can creep into evaluations and warn them to keep those kind of errors out of evaluations. And then, furthermore, you'd get more than one supervisor's evaluation if possible so that it would—you could get three or four individuals to rate a man, you'd feel far more comfortable that you'd

have an objective evaluation of that individual than if you had only one supervisor.

Q. You mean as objective as you can get? A. As objective as you can get.

Q. You can't totally eliminate subjectivity? A. There's no such thing as perfection.

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[157] Q. How many—the men that were selected for this job—correct? This instrument job at Monroe? A. Yes.

Q. They all got acceptable or recommended status on the test? A. They all met the standards for the test, yes.

Q. Which are recommended or acceptable or what is the word? A. The word should have been acceptable. It was recommended in that job mostly. The word should have been acceptable.

Q. Everyone of them that got the job, therefore, had an acceptable rating on the test, is that right? A. With the exception of the incumbent.

Q. The incumbent? He was not incumbent to that plant, was he? [158] A. No, he was not.

Q. He was incumbent in some other plant? A. That's correct.

Q. And in his case you overlooked it? A. That's correct.

MR. HOUGHTON: What was that last question?

JUDGE BARBAN: You overlooked it.

MR. HOUGHTON: I see.

THE WITNESS: In response to your question——

MR. LEWIS: I thought you did answer it.

THE WITNESS: Not as accurately as I can.

Q. (By Mr. Lewis) Go ahead. A. The interviewers called us and asked for the performance of a list of individuals on that particular test battery. Now they asked us

for that individual performance. We gave them—the interviewer—the recommendation that the man had not met the test standards, as we had just changed them. We had just raised the standards. And he did not, in fact, meet the new standards, which were higher.

It became known to us later that this man was already on that job.

Q. In another plant? A. In another plant. And we went and spoke to the individual who was responsible for that selection and said we gave out these results on this individual by mistake. Had we known at [159] the time that the results were asked for, for that individual, that he was, in fact, an incumbent in another plant, we would not have given you any test results on that individual at all.

Q. But how would it comply with the mandate on the job vacancy that you must get a recommended or an acceptable standing on the test? A. I'm sorry, I don't know how that would apply except that I would not have given out test results on that individual had I known at that time that he was already working as an instrument man. And so we told the engineer that was responsible for making that selection that he would have to disregard those test results because the man was already on the job and he could not use the test to deny that man that job.

Q. You talked about people who get a low score being harrassed from time to time, Mr. Roskind, is that right? A. That happened quite some time ago, in the company.

Q. Yes, well, in the instant case, wouldn't everyone who was not selected at Monroe, wouldn't he know he got less than 9.3 on the test? Wouldn't he know that by inference or by deduction? A. At this point in time, I guess he would.

Q. Because the arbitrator said you must look at all who had 9.3 or better, isn't that right? A. That's correct.

Q. So if you weren't looked at you got less than 9.3? A. That's correct.

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[162] JUDGE BARBAN: Dr. Roskind, you stated, on at least two or three occasions, concerning setting a standard or a cutting score. And on one occasion, raising the standard to a new standard. Who did this?

THE WITNESS: The original score was set at the time of [163] the original validity study back in 1958 or 1959.

JUDGE BARBAN: Was this done by management?

THE WITNESS: The score was set—the industrial psychology division—by Mr. Al Kanous and Dr. Greydon.

JUDGE BARBAN: When I speak of management I mean by the company.

THE WITNESS: By the company.

JUDGE BARBAN: Do you know whether the union played any part in that score?

THE WITNESS: To the best of my knowledge, they did not.

JUDGE BARBAN: When was that changed?

THE WITNESS: In 1970, '69 or '70. The men who were responsible for the instrument men, who worked for it, came to us and told us they were not satisfied with the individuals that were being selected by the current test battery and could we raise the score. And we said just on your say-so alone, we cannot raise the score. If you really are having a problem, we could conduct another validation study, a followup study and re-evaluate the current level of the men on the job today. And see whether or not the score is appropriate.

We didn't promise them we were going to raise the score or lower the score. We were just to do a followup study to see how, in fact, the present score was working.

And as a result of this research project in 1969 or '70, we decided it would be appropriate to, in fact, raise the score slightly. [164] And that was done by management.

JUDGE BARBAN: With or without the cooperation of the union?

THE WITNESS: Without any contact with the union.

JUDGE BARBAN: Thank you. Any further questions on these matters?

MR. HOUGHTON: Yes, I have just a few.

REDIRECT EXAMINATION

Q. (By Mr. Houghton) On the cutoff score, so I understand it, I understand that you get all your statistical information together and you plot it on a scatter plot or chart. That then determines the cutoff score? A. After you've placed all this information on the scatter plot, what you do is place the cutoff score so it will operate most effectively and you will make the least number of mistakes in predicting poor performance and in predicting good performers on the job.

Q. Is the selection of the cutoff point, then, a function of the results of the data? A. Yes it is.

Q. It's not something you just arbitrarily select and say, well, we'll set it at 10.3. A. That's correct, it's not that.

Q. If you were take the data and move the cutoff score from 10.3 to 11 or down to 9, the other side, what would happen in [165] terms of predictability? A. You would increase the number of errors you would be making in terms of selecting people.

Q. This would be true whether you raise or lower the cutoff score? A. That's correct.

Q. Just for the record, this incumbent that you discussed, who did not score satisfactorily on the revised test, but was put in the job because he was incumbent, am

I also correct that under the old form of testing, where you had the three tests involved, he did pass that test battery? A. Yes, he did. He passed under the three test system. He was acceptable on the original test battery and that's how he got into the job originally. It was only after we raised the standard that he slipped just below it.

Q. You were asked questions about whether or not you ever utilized two validity studies for the same test battery. Isn't that what happened here? Didn't the Edison company run its own validity study and then you had National Compliance run its validity study? A. That's correct.

You say you had two validity studies in effect for this test? A. That's right.

Q. Did the National Compliance, in conducting their validity [166] study, utilize or request copies of the actual tests, themselves? A. No, they did not.

Q. With reference to when the union may have first requested these tests, do you, of your own knowledge know, whether the union made a general request for copies of employee's tests during the 1972 general negotiations? A. Yes, I understand they did. I have seen minutes of their meetings. I understand that they did, in fact, request some copies of tests.

Q. And this was during negotiations for the present collective bargaining agreement? A. That's correct.

Q. And as a result of that request, were they given copies of the tests? A. No, they were not.

Q. And to your knowledge, was any contract item added into or taken out from the collective bargaining agreement pertaining to that question? A. Not that I know of.

Q. In connection with employees test scores and such. Have you had occasion, Dr. Roskind, where you've been confronted with a situation asking release of these scores. For example for a court proceeding or the Justice Department and if so, how do you handle that situation? A.

Approximately two years ago, the Department of Justice, [167] Civil Rights Division came to the company and conducted extensive investigations and they and the EEOC and the Michigan Civil Rights Commission all demanded copies of the tests. We explained to them why we could not give them copies of the tests and evidently they accepted that and finally, for the Department of Justice we did send a set of tests to their industrial psychologist. With a stipulation that he would protect their confidentiality.

Q. Did you at any time release actual test scores of individuals? A. In that same case, the Department of Justice asked us for test scores of specific individuals. And we reached an agreement that the only way we could give the department these specific test scores by name was to obtain a written release from those individuals prior to giving the government that information. In several cases, the individuals refused to sign the release, said they did not want the government to have that information and we did not forward the test scores for them. And the government accepted that.

Q. The employees signed releases. A. That's correct.

Q. In terms of verifying the scoring procedure, if I come to you as an employee and say I can't understand why I got such a low score. I thought I really did well on that test. Would you please double check the scoring. I think a mistake was [168] made. Do you have requests like that and so how do you handle them? But I don't think I've ever had that kind of a request. But if I did I would certainly go ahead and have the sheet pulled up and rechecked. And I would sit down with the individual and go over his test performance and try to help him understand.

Q. One question that occurred to me. In our mechanized society that we have today, why wouldn't you use live machines to score these tests, rather than individuals? A. We have given some thought to obtaining some scoring

machines, however, we're not doing that large a quantity a job right now. So we really can't justify having a scoring machine. Naturally we tend to get the job done faster by hand and the last individual that was in with a scoring machine, to demonstrate it and show how well it worked—he gave five of us a piece of paper and asked us to mark ten answers. The first ten answers, and most of us did. And we were just guessing because we hadn't seen any questions. He had a key already built into the machine. One of the people that works for me got carried away and marked more than ten answers. And while most of us got a score of two or three or four, which could have been a chance probability score, this one individual got a score of fourteen on supposedly a ten item test. So evidently there was a flaw in the machine. The salesman left kind of very embarrassed.

Q. You've had no substantial problem, I take it, with the [169] accuracy of the system that you use in terms of scoring? A. No. We haven't had any problem with accuracy. The people who do scoring are quite competent individuals. They're individuals who are quite conscientious and two people who are currently working for us now and do this work, one of them has a bachelor's degree in psychology. The other one has a master's degree in industrial psychology. They are professional level people.

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RECROSS EXAMINATION

Q. (By Mr. Lewis) Mr. Houghton just asked you about the encumbent, what's his name, Mr. Elliott? You said that he didn't score acceptable or recommended in later tests, but you said that he did score acceptable or recommended in the former test, is that right? A. That's my recollection, yes.

Q. The step two answer—that exxhibit, step two answer, could I get the number of that exhibit, please?

JUDGE BARBAN: That's number four. Exhibit No. 4.

Q. (By Mr. Lewis) This is the answer on step two, Mr. Roskind, I'll just read the last paragraph and it says ten Mound Road employees applied and weren't considered prior to bids from employees outside of the Monroe powerplant. Nine were [170] scheduled to take the test for the first time under the new standard. Two failed to show up for testing. The other seven were tested and their test performance was evaluated as not recommended. Here it is. One man, Mr. Wiley, who was tested under the old standard, was evaluated as acceptable, under the old standard, prior to September 21, 1970. His test was re-evaluated at the time of the bid and in accordance with the new standards. His test was evaluated as not recommended, based upon these new standards.

Q. How is that any different than the incumbent? A. The situation, in terms of the testing, was identical in terms of the two individuals.

Q. But Mr. Wiley didn't get the job, right? A. Mr. Wiley was not an encumbent on the job.

Q. But he didn't get the job. A. That's right.

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General Counsel's Exhibit No. 1(a)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

Case No. 7-CA-10276(2)

Date Filed 4-4-73

1. Employer against whom charge is brought

   a. Name of Employer—Detroit Edison Company

   b. Number of Workers Employed—10,000

   c. Address of Establishment (Street and number, city, State, and ZIP code)—2000 Second Ave, Detroit, Michigan

   d. Employer Representative to Contact—E. Ruch, Dir. Labor Relations

   e. Phone No.—WO 2-2100

   f. Type of Establishment (Factory, mine, wholesaler, etc.)—Public Utility

   g. Identify Principal Product of Service—Electric

   h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) and 8(d) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about April 2 1973, the above named employer has refused to bargain in good faith with Local 223 UTILITY WORKERS OF AMERICA AFL-CIO, the certified bargaining agent herein, by refusing to give The

Actual Battery of Tests Used in a promotion criteria grievance and bypass of several seniority employees—which absence of such disclosure materially affects and is pertinent to the obligation to perform duties of the bargaining agency. Management has met the Union's request and has supplied other items contained and asked for in its letter of March 5 1973 but refuses to grant or give the actual battery of tests which is 'crucial' or 'key' to a pending case and may affect many others in the future.

By this action, and continuing, the above-named employer, by its officers, agents, and representatives, has failed and refused to bargain collectively and in good faith with Local 223 UTILITY WORKERS UNION OF AMERICA AFL CIO, a labor organization designated and selected by a majority of the employees of said employer at its Monroe Power Plant Division and more than 20 other divisions for the purposes of collective bargaining in respect to pay, wages, hours of employment and other conditions of employment.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number) Local 223 Utility Workers Union of America AFL CIO

4a. Address (Street and number, city, State, and ZIP Code—2757 Grand River Ave, Detroit, Michigan 48201

4b. Telephone No.—WO 1-2901

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)—Utility Workers Union of America AFL CIO

6. Declaration
I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By C. J. Lewis

(Signature of representative or person filing charge)

(Title, if any)—Director of Services UAW AFL CIO

Address—1717 Grant Deneau Bldg., Dayton Ohio 45402

(Telephone number)—513-223-0123

(Date)—4/4/73

Willfully false statements on this charge can be punished by fine and imprisonment (U.S. Code, Title 18, Section 1001)

General Counsel's Exhibit No. 1(c)

[August 8, 1974]

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COMPLAINT AND NOTICE OF HEARING

It having been charged by Local 223, Utility Workers Union of America, AFL-CIO, herein sometimes called Charging Union, that The Detroit Edison Company, herein sometimes called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Acting Regional Director for the Seventh Region, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations—Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The original charge in Case No. 7-CA-10276(2) was filed by Charging Union on April 4, 1973, and served by registered mail upon Respondent on or about April 6, 1973.

2. Respondent is, and has been at all times material herein, a corporation duly organized and existing by virtue of, the laws of the States of Michigan and New York.

3. At all times material herein, Respondent has been a public utility engaged in the generation, sale and distribution of electrical energy within the State of Michigan. Respondent's Monroe, Michigan, power generating plant is the only facility directly involved in this proceeding.

4. During the calendar year ending December 31, 1973, which period is representative of its business operations at all times material herein, Respondent purchased from outside the State of Michigan and had shipped directly to its Michigan facilities supplies valued in excess of $5,000,-

000. During the same period, Respondent sold electrical energy valued in excess of $250,000,000 to customers within its service area which includes an approximate eleven-county geographical area within and surrounding the Detroit, Michigan, metropolitan area.

5. Respondent is now and has been at all times herein an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

6. Local 223, Utility Workers of America, AFL-CIO, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

7. At all times material herein, the following-named persons occupied the positions set opposite their respective names, and have been and are now supervisors of the Respondent within the meaning of Section 2(11) of the Act, and/or its agents:

E. Ruch, Director of Union Relations

R. W. Schleicher, President's Delegate

Fred J. Locke, Technical Engineer

William L. Roskind, Industrial Psychologist

D. G. Thomas, Union Relations Department Representative

8. All operating and maintenance employees of Respondent's Production Department at its Monroe Power Plant, but excluding supervising operators, student engineers, training personnel, professional employees, technical employees, office clerical and plant clerical employees, part-time employees, temporary employees, seasonal employees, guards, foremen, assistant foremen, and all other supervisors as defined in the Act, and all other employees constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

9. On or about March 24, 1971, in Case No. 7-RC-10330 a majority of the employees in the unit set forth in paragragh 8, above, selected and the Regional Director of the Seventh Region on April 1, 1971, certified the Charging Union as their exclusive collective-bargaining representative.

10. At all times since April 1, 1971, and continuing to date, by virtue of the Certification of Representative in Case No. 7-RC-10330, the Charging Union has been the designated representative for the purpose of collective bargaining of the employees in the unit described in paragraph 8, above, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

11. On or about January 17, 1972, the Charging Union filed a grievance against Respondent, pursuant to the then-current collective-bargaining agreement between Respondent and the Charging Union, pertaining to the qualifications for, and promotion to, the Instrument Man B job classification (PMO-123).

12(a). Commencing on or about March 5, 1973, and at all times since, and more particularly in writing and/or orally on or about March 5, April 2, May 23, June 2, June 26 and July 23, 1973, the Charging Union, by its agent, Clem Lewis, has requested Respondent to furnish the Charging Union with the actual Instrument Man aptitude test(s) administered to, the examination papers of, and the actual test scores attained by, each employee involved in the grievance referred to in paragraph 11, above, who had taken said test, including both those promoted and those not promoted to said classification.

(b) The information requested by the Charging Union, as specified in paragraph 12(a), above, is relevant and necessary to the processing of the grievance referred to in paragraph 11, above, including the ascertainment of promotion criteria, the veracity of the scoring and grading of the examination and the testing procedures, and the job relatedness of the test(s) to the Instrument Man B classification.

13. Since on or about March 15, 1973, and at all times since, and more particularly in writing and/or orally on or about March 15, April 2, May 23, July 10, July 18, July 23, and August 6, 1973, Respondent has refused and continues to refuse to furnish the Charging Union with the information requested and described in paragraph 12, above, because said records were purportedly confidential.

14. By the acts described above in paragraph 13, and by each of said acts, Respondents did interfere with, restrain, and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

15. By the acts described above in paragraph 13, and by each of said acts, Respondent did refuse to bargain collectively and is refusing to bargain collectively with the representative of its employees, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and Section 2(6) and (7) of the Act.

16. The acts of Respondent described in paragraph 13, above, occurring in connection with operations of Respondent described in paragraphs 2 through 5, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend

to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

17. The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

WHEREFORE, it is prayed that Respondent be ordered to:

1. Cease and desist from:

(a) Failing and refusing to furnish the Charging Union with the information specified in paragraph 12, above.

(b) Otherwise refusing to bargain in good faith with the Charging Union.

(c) In any other manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following appropriate affirmative action:

(a) Upon request, make available to the Charging Union the aforesaid information specified in paragraph 12, above, providing that only the Charging Union's agents directly involved in the processing of the grievance involved herein shall be permitted access to the actual Instrument Man B aptitude test(s) involved herein.

(b) Bargain in good faith with the Charging Union.

(c) Post appropriate notices.

IT IS FURTHER PRAYED that said Order provide for any and all other relief appropriate herein.

PLEASE TAKE NOTICE that on the 23rd day of September, 1974, at 10:30 a.m., Eastern Daylight Time, at Room 500, Book Building, 1249 Washington Boulevard, Detroit,

Michigan, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person or otherwise and give testimony. Form NLRB-4668, Summary of Standard Procedure in Formal Hearings held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that pursuant to Section 102.20 and 102.21 of the Board's aforementioned Rules and Regulations, the Respondent shall file with the undersigned Acting Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Detroit, Michigan, this 8th day of August, 1974.

/s/ Henry L. Chiles, Jr.
Henry L. Chiles, Jr.
Acting Regional Director
National Labor Relations Board
Seventh Region — 500 Book Building
1249 Washington Boulevard
Detroit, Michigan 48226

General Counsel's Exhibit No. 1(e)

[August 16, 1974]

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ANSWER OF EMPLOYER, THE DETROIT EDISON COMPANY

Now comes THE DETROIT EDISON COMPANY, by its attorneys, Fischer, Franklin & Ford, in answer to the Complaint and Notice of Hearing heretofore issued by the Board on August 8, 1974, and states as follows:

1. Respondent neither admits nor denies the allegations set forth in paragraph 1 for lack of information.

2. Admitted.

3. Admitted, except that Respondent denies that its Monroe Generating Plant or any other particular physical facility is involved in these proceedings.

4. Admitted.

5. Admitted for the purpose of this case.

6. Admitted.

7. Admitted in part. E. Ruch, Director of Union Relations, is a supervisor within the meaning of Section 2(11) of the Act. R. W. Schleicher, Fred J. Locke, William L. Roskind are not supervisors within the meaning of Section 2(11) of the Act.

8. Admitted.

9. Admitted.

10. Admitted.

11. Respondent neither admits nor denies the allegations set forth in paragraph 11 for lack of information.

12(a). Admitted. For further answer, Respondent states that the Union and grievants voluntarily submitted this dispute to arbitration (Grievance PMO-123), which matter was presented to Dallas L. Jones. Said Arbitrator,

in a decision dated December 3, 1973, determined that he had no authority to give the Union the actual Instrument Map Aptitude Tests or the examination papers or actual test scores attained by employees, and he further ruled that such information was not relevant and was in no way necessary for the Union to pursue its grievance.

(b). Denied. See answer set forth in response to paragraph 12(a) above.

13. Admitted. For further answer, Respondent states that said records are, in fact, confidential. In addition, Respondent has failed to provide the charging Union with the requested information because it is not relevant or necessary for the purpose of pursuing Grievance PMO-123 or for any other reason. In so doing, Respondent did not in any way interfere with, restrain or coerce its employees in exercise of their Section 7 rights under the Act, nor did it in any way interfere with the Union's responsibilities and right to bargain collectively.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

WHEREFORE, it is prayed that the Charging Party's Complaint be dismissed with prejudice, and further that Respondent be granted any further relief appropriate herein.

DATED: August 16, 1974.

FISCHER, FRANKLIN & FORD
By: /s/ RALPH H. HOUGHTON, JR.
Ralph H. Houghton, Jr.
Attorneys for Employer
1700 Guardian Building
Detroit, Michigan 48226
962-5210

General Counsel's Exhibit No. 2

NATIONAL LABOR RELATIONS BOARD

Docket No. 7-CA-10276(2) OFFICIAL EXHIBIT No. GC-2

Disposition) Identified √
) Received √
) Rejected

In the matter of Detroit Edison

Date 9/23/74 Witness, Lewis Reporter, OL

Pages 143

Agreement

BETWEEN

THE DETROIT EDISON COMPANY

AND

LOCAL UNION NO. 223

OF THE

UTILITY WORKERS UNION
OF AMERICA

AFFILIATED WITH THE

AFL-CIO

SIGNED JULY 7, 1969

Section 13. *Promotions.* In promotion of employes covered by this Agreement to classifications within the same bargaining unit, seniority will govern whenever reasonable qualifications and abilities of the employes being considered are not significantly different. "Significant difference" shall be "head and shoulders difference", and such factors as advance licenses or step-up experience shall not of themselves amount to significant differences. If the Management proposes to by-pass any employe with greater seniority, the Management will discuss the matter with the chairman of the bargaining unit involved (at least five (5) days before the by-pass is made effective) in an attempt to reach an agreement thereon before such a by-pass is made. In the event of disagreement, the matter may be processed through the grievance procedure to the President of the Company, or his delegate, whose decision shall be controlling, except that the question of whether the by-pass has been arbitrary or discriminatory may be submitted to arbitration in accordance with Article V of this Agreement. If the arbitrator finds the by-pass was arbitrary or discriminatory, the by-pass will be canceled.

Section 14. *Trial Perioa.* a. Except as otherwise provided in paragraph c of this section, every employee who begins employment for the first time in a classification in a bargaining unit shall be on trial for a period of six (6) months from the first day of his continuous employment in that classification to demonstrate his abilities and qualifications for such work. If he shall be found not qualified by Management during this six (6) month period, he shall be returned to his former bargaining unit and classification, if any, without prejudice. In the event of disagreement concerning the employe's ability or qualifications, except in the case of a probationary employe, the matter may be processed through the grievance procedure up to the President of the Company, or his delegate, whose decision shall be controlling, except that the question of whether the Management's action has been arbitrary or discriminatory may be

submitted to arbitration in accordance with Article V of this Agreement.

b. In the case of a probationary employe, or one who is rehired into a classification in which he has no seniority, termination of employment shall not be the subject of a grievance or arbitration. Otherwise, such an employe shall have the full benefit of the grievance procedure under Articles IV and V.

c. (Exception to paragraph a of this Section:) Both parties recognize that in some instances six (6) months may not be a sufficient period of time in which to adequately judge the qualifications and abilities of an apprentice in training. In the event an apprentice in training does not pass required classroom work, he will be permitted one (1) repeat session for each course failed during each term of the training program provided he is otherwise progressing satisfactorily. Should a second attempt in any course also result in failure, the apprentice may be dropped from the training program and classification. If such employe, because of classroom work or on-the-job performance, is found not qualified after having been longer than six (6) months in the training program, he shall be returned to his former classification, if any, and he will be credited with an additional six (6) months of seniority in his former classification. If such employe has no former classification to which he can be returned, the Company will attempt to place him on other work which he is qualified to perform; but, in such event, he will not be credited with seniority in the newfound classification.

• • •

Section 38. *Posting Notices of Vacancies.* a. If a vacancy occurs in any one of the bargaining units covered by this Agreement and such vacancy is not filled by promotion or transfer within the group, a notice of such vacancy shall be posted for a period of five (5) days in the bargaining unit in which it occurs and copy sent to a Union divisional officer designated by the respective division.

b. If such a vacancy is not filled by a member of the bargaining unit, notice of the vacancy shall be posted in other bargaining units of the same department for a period of five (5) days. If the reasonable qualifications and abilities of the employes being considered as a result of this posting are not significantly different, total length of service in the Company shall govern. "Significant difference" shall be "head and shoulders difference", and such factors as advance licenses or step-up experience shall not of themselves amount to significant differences.

c. If such a vacancy occurs in any one of the bargaining units covered by this Agreement, which is not filled by the foregoing procedure, notice of this vacancy will be posted on the bulletin boards of the other units stating that such a vacancy exists. Such vacancies will not be filled, except on a temporary basis, until at least five (5) days after the posting of such notices, in order that employes in other units may apply. If the reasonable qualifications and abilities of the employes being considered are not significantly different, total length of service with the Company shall govern. "Significant difference" shall be "head and shoulders difference", and such factors as advance licenses or step-up experience shall not of themselves amount to significant differences.

d. Failure of an employe to avail himself of opportunities for promotion or voluntary transfer shall not prejudice his future opportunities.

• • •

Section 42. *Training Advisory Groups.* A training Advisory Group shall be formed in each bargaining unit having a formal training program for Union-represented employees (other than operator training programs, but including apprentice training programs). The purpose of each Training Advisory Group will be to make recommendations for the development and improvement of said training programs. Each Training Advisory Group will consist of two (2) members from the bargaining unit, two (2)

Management members from the department involved, one (1) Local Union appointee, and one (1) Management member from Training Services who will serve as Secretary. All six (6) such members shall have voting rights. Meetings will be arranged at mutually agreeable times at the request of any two (2) members. Agendum will be distributed to the members of a group before the date of a meeting. Union or Management members may have an incumbent employe present at a meeting as a non-voting participant. If agreement on a particular proposal cannot be reached by a vote of a majority of the members, the proposal of the Management members of the group shall be recommended to the Company, subject to the Union's right to bring a grievance under Articles IV and V. These groups (including incumbent employes) shall meet on Company time.

General Counsel's Exhibit No. 3

Case No.—PMO-123

Dated—1-20-72

Company—Detroit Edison Co.

City and State—Monroe, Michigan

Employee's Name—Union Grievance

Plant or Division—Monroe Power Plant

Department—Production

Number of men involved—6 six

Date of grievance—1-17-72

Name of Shop Steward or Committeeman—Bill Wright

Description of grievance—Art. VIII, Sec. 38, Vacancies, Posting Notices of, Art. 4, Sect. 2—Disagreement between union & management. The union feels the testing procedure used was unfair in filling the six vacancies in the instrument shop. The bidders from Monroe Power Plant should have been selected. Restitution sought, the six senior men from Monroe be placed on the inst. job.

Signature of employee—R. Sprayberry, Chairman Monroe Power Plant

Case History of Grievance

January 21, 1972

None of the Monroe Power Plant grievants who were by-passed for the Instrument Repairman job posting of November 4, 1971 met the selection standards of the Instrument Repairman Aptitude Test, which is one of the required qualifications.

They were given the same aptitude test as those that were selected. They were graded in the same manner as those that were selected. Since they did not meet the required posted qualifications for this test, they were not selected.

/s/ Fred J. Locke
Fred J. Locke

General Counsel's Exhibit No. 4

[Letterhead]

March 5 1973

The Detroit Edison Company
2000 Second Avenue
Detroit Michigan 48201

Attention—Mr E Ruch, Director of Union Relations
Gentlemen:

I am writing in connection with the forthcoming arbitration in re PMO 123 scheduled for hearing soon. I believe the undersigned will be the advocate in that matter.

After reading the record, and in an effort to save time, and I believe I have it coming as disclosure in accord with the Board's rules, I respectfully ask you to send me the following exhibits and material:

1. The actual battery of tests used in the captioned matter.

2. The method of scoring or grading and the actual criteria for finding 'acceptability' or 'recommended' or 'Not Recommended'.

3. A report on the test validation.

4. A report by the National Compliance Company, which, as I understand it, consulted upon, and reviewed the Company's whole testing system or apparatus.

I presume there is no way to settle this matter (out-of-arbitration) but if you wish to talk to me about that—or in connection with the above—please advise—since I hope to be at Detroit Office the coming Friday, Saturday, Sunday, and Monday; you could send the material to that location. I am available Tuesday at the Dayton telephone number above. Many thanks.

Very truly

/s/ Clem Lewis
Director of Services.

CC: Ralph Houghton

General Counsel's Exhibit No. 5

[Letterhead]

March 15, 1973

Mr. Clem Lewis
Director of Services
Utility Workers Union of America
1717 Grant Deneau
Dayton, Ohio 45402

Re: Detroit Edison Labor Arbitration (Grievance PMO-123)

Dear Mr. Lewis:

This letter will confirm our telephone conversation on March 13, at which time we discussed a possible meeting regarding the above matter.

I have arranged for us to meet with Mr. William L. Roskind at The Detroit Edison Company on Monday, April 2, 1973, at 2:00 P.M.

As I explained, the actual battery of tests used in the testing program are confidential and in order to insure the future integrity of those testing procedures, they cannot be released. Mr. Roskind has indicated, however, he would be pleased to discuss the testing procedures with you, as well as explaining the validation procedures, etc.

I would suggest we meet on April 2 in Mr. Ruch's office at 2:00 P.M. and we can then proceed to an appropriate conference room.

Very truly yours,

/s/ Ralph H. Houghton, Jr.
Ralph H. Houghton, Jr.

RHHjr/mm

General Counsel's Exhibit No. 6

Research and Education Department
Utility Workers Union of America, AFL-CIO

National Headquarters
Grant/Deneau Tower, Dayton, Ohio 45402

May 23 1973

TO: Mr. Dallas Jones, Arbitrator, operating under the auspices and rules of American Arbitration Association

From: C J Lewis, Director of Services, Utility Workers Union of America

Subject: Arbitration in connection with Grievance PMO 123—Detroit Edison Co

We have previously asked the Management of Detroit Edison Company to supply us with the actual tests which were the instruments to effectively foreclose grievants in the above matter from entering training, trial or promotion to Instrument Man classification at the Monroe Plant of Detroit Edison. We have also gone to the Labor Board where a case is pending, it being our position that it is a Statuatory Obligation of Management to supply us with this information.

Quite apart from the Labor Board case, the Arbitrator has the right and duty, on petition from one of the advocates, to order a party to produce certain records necessary to the case of the other side and relevant to the cause at bar. Going further, the Arbitrator can actually subpena such records.

We regard the actual tests as essential, and perhaps key, to our case and we ask you forthwith:

1. To have Detroit Edison supply the undersigned as Advocate for the Union, copies of the actual tests used by sixteen candidates who applied for the Instrument job.

2. Failing item 1 above, to subpena the actual tests and make them available to the undersigned.

Much has been said about the secrecy and confidentiality of these tests and I assure all concerned that such an item does not bother or interest this advocate in the least. What this advocate needs to know is if the questions on these tests are reasonably relevant to the Job being considered. This could be an important point in our defense.

/s/ C. J. Lewis
C. J. Lewis

General Counsel's Exhibit No. 7

June 2 1973

To: Mr. Ralph Haughton, Attorney At Law, Guardian Building, Detroit Michigan

From: Clem Lewis, UWUA, 1717 Grant Deneau Building Dayton Ohio

Subject: Deposition and Statement of Arthur D Wiley Jr

If you recall, at the conclusion of the day's hearing on May 31, 1973, in re arbitration of grievance PMO-123, heard before Professor Dallas Jones, it was agreed, because of Mr Wiley's illness, that I could take his testimony or statement in writing and submit the same to you.

I had Mr Wiley in the Union Building today and took the attached or enclosed statement; you will see that it provides you to the opportunity to cross-examine in writing if you so desire.

I will send you two copies of Mr Wiley's statement; if you agree with it, without the need for cross examination, you can forward the original to Professor Dallas Jones—or back to me and I will forward it—or we can turn it over to the AAA Office in Detroit for transmission to him.

I am going to send Professor Jones a copy of this letter, but not a copy of Mr Wiley's statement—for the reason that I want the arbitrator to know there is a statement or deposition coming to him—either in its original form—or coupled with a cross-examination if you wish to meet Mr Wiley and write one.

Inasmuch as I am writing you, and after much deliber tion, I find I cannot withdraw my request for the actu tests, scores, and weights. While the Company has made samples for me, and I appreciate that, and while it gave scores without revealing names, I have the problem of knowing the weights in the 6 parts of the EPSAT test—the

total weight of EPSAT—then the weight of Minnesota Form Board—then how the various parts fit together to form the possible apex of 15.3 in the upper limit, quite apart from the 10.3 cut off score.

Then, to be quite frank, after listening to some who got the job and some who were refused, we are amazed—just as we were amazed by the samples offered to us in the Physical Science section of EPSAT.

Sincerely,

/s/ Clem Lewis

COPY: Professor Dallas Jones
NLRB

General Counsel's Exhibit No. 8

FISCHER, FRANKLIN & FORD
Attorneys and Counsellors

1700 Guardian Building/Detroit, Michigan 48226
Telephone (313) 962-5210

July 10, 1973

Mr. Clement Lewis
Local 223, UWUA, AFL-CIO
1717 Grant Deneau Tower
Dayton, Ohio 45402

Re: Detroit Edison Labor Arbitration
Grievance PMO-123 (AAA Case No. 5430 0720 72);
Mr. Lewis' Request of June 2 and June 26, 1973

Dear Mr. Lewis:

Reference is made to your letter of June 2, 1973, in which you request certain information pertaining to the testing procedure involved in the Instrumentman Battery. This request was also referred to in your letter of June 26, 1973. While we were in the process of gathering together information to satisfy your request, Arbitrator Dallas L. Jones forwarded a letter to the parties under date of July 3, 1973. This letter and the enclosed information are being forwarded to you and Professor Jones in response to your inquiries. We have made a diligent attempt to provide you with all the information that you will need in order to have a competent psychologist properly analyze these tests and the testing procedure.

As I advised you at the arbitration hearing, the actual test scores of the employees have always been considered extremely confidential by the Company and, in fact, they have never been made available to members of management of the Company or any other persons other than the trained, qualified Company psychologists. Furthermore, in

this case, none of the employees involved have given the Company any express permission to release this information. Therefore, as we previously indicated, we must respectfully decline your request for that information. I would remind you, of course, that during the hearing we did present an exhibit which demonstrated the range of actual scores attained by the grieving employees who are involved in this case.

With respect to your request for the actual tests themselves, again I would advise you that these have been considered confidential by the Company and we could not comply with your request without destroying the future validity of those tests. Furthermore, I am advised by Mr. Roskind and Mr. Kanous that such a disclosure would be violative of Principle 13 of the Ethical Standards of Psychologists. From a practical standpoint, which I am sure you can understand, the Company has spent tens of thousands of dollars in validating these studies and tests which were utilized in this case. The use of those tests themselves depend, in part, on the naivete of the applicants and employees who take the test. Therefore, from all standpoints, it is necessary that we maintain the confidentiality of those tests. Furthermore, as we indicated at the hearing, a competent, trained psychologist can properly study and evaluate the test and the validation procedures with the information you already have in hand. It is not necessary that he have a copy of the actual tests themselves and, furthermore, even if he did, they would be of no particular use in reaching a decision as to whether or not the tests were properly validated and utilized.

In your letter of June 2, you did request certain information pertaining to the battery weights and method of scoring both the Minnesota Paper Form Board Test, as well as the EPSAT Test. I believe all of that information was presented at the hearing. However, I did ask Mr. Roskind to prepare a statement setting forth that data in line

with your particular request so that it would be available to you to utilize in reviewing the testimony and preparing your brief. That information is set forth on the two exhibits enclosed herewith, the first one being entitled "Explanation of Battery Weight, Raw Score and Items on Minnesota Paper Form Board Test and EPSAT Test", and the second being entitled "Instrumentman Battery". I believe those two exhibits contain all of the information requested in your letter except as noted above.

If you require any other or further information regarding this matter, please let me know.

Very truly yours,
/s/ Ralph H. Houghton, Jr.
Ralph H. Houghton, Jr.

RHHjr/mz
Enclosures
cc: Prof. Dallas L. Jones (w/Enclosures)
American Arbitration Assn. (w/o Enclosures)

Explanation of Battery Weight, Raw Score and Items on Minnesota Paper Form Board Test and EPSAT Test

The Minnesota Paper Form Board (MPFB) Test is composed of 64 items of identical format. For an example see Company exhibit Number 5, Part X. An employe's performance on this test will result in a score which ranges between 0 and 64, and an accompanying battery weight which ranges between 2.61 and 6.62. For the actual correspondence between a given raw score and its battery weight, see the attached sheet titled Instrumentman Battery.

The Engineering and Physical Science Aptitude Test (EPSAT) is composed of 155 items whose item format

varies between the six parts of the test. A tabulation of the number of items per part and their corresponding example may be seen below.

Part	Items
1. Math Example—Company Exhibit No. 5, Part III	25
2. Formulation Example—Company Exhibit No. 8	10
3. Physical Science Comprehension Example—Company Exhibit No. 12	45
4. Arithmetic Reasoning Example—Company Exhibit No. 9	10
5. Verbal Comprehension Example—Company Exhibit No. 5, Part I	43
6. Mechanical Comprehension Example—Company Exhibit No. 5, Part VI	22
Total	155

No weight has been assigned to each of the six parts of the EPSAT. Each part of the EPSAT is first scored separately for administrative and research purposes. Then the scores on the six parts are added together and are considered as a single score. Thus an employe's performance on the EPSAT ranges between 0 and 155. The battery weight for this test as a whole ranges between 1.43 and 8.65. For the actual correspondence between a given raw score on the EPSAT and its battery weight see the attached sheet titled Instrumentman Battery.

In answer to the question of how a battery score of 15.3 is achieved, you are again referred to the attached sheet which shows the correspondence between raw scores and battery weights over their full range. A score of 59 or more on the MPFB results in a battery weight of 6.62. A score of 125 or more on the EPSAT results in a battery

weight of 8.65. These two weights are added together to obtain a battery score of 15.27 which is then rounded up to 15.3. You will recall that the battery weights were derived from the multiple regression equation in the validation research.

In reference to your request for the actual tests, scores, and weights, I believe that the above information should aid your understanding of the relationship between test scores and weights.

INSTRUMENT BATTERY

September 1970

Minnesota Paper Science Aptitude Test		Engineering and Physical Form Board Test	
Raw Score	Wt.	Raw Score	Wt.
59-64	6.62	125-155	8.65
57-58	6.38	117-124	8.17
54-56	6.14	109-116	7.69
52-53	5.90	101-108	7.20
49-51	5.66	93-100	6.72
47-48	5.43	85- 92	6.24
44-46	5.19	77- 84	5.76
41-43	4.90	69- 76	5.28
38-40	4.61	60- 68	4.74
35-37	4.33	52- 59	4.26
33-34	4.09	44- 51	3.78
30-32	3.85	37- 43	3.30
28-29	3.61	29- 36	2.88
25-27	3.37	21- 28	2.40
22-24	3.09	13- 20	1.92
20-21	2.85	0- 12	1.43
0-19	2.61		

ACCEPTABLE BATTERY SCORE 10.3

General Counsel's Exhibit No. 9

FISCHER, FRANKLIN & FORD
Attorneys and Counsellors

1700 Guardian Building/Detroit, Michigan 48226
Telephone (313) 962-5210

July 18, 1973

Mr. Clem Lewis
Local 223, UAW, AFL-CIO
1717 Grant Deneau Towers
Dayton, Ohio 45402

Re: Detroit Edison Labor Arbitration
Grievance PMO-123 (AAA Case No.
5430 0720 72)

Dear Mr. Lewis:

Reference is made to your letter of July 13, 1973, regarding the above matter.

I appreciate the fact that you are questioning whether or not there is a "head and shoulders difference" between those that were selected for the job and those who were not. We, of course, look at the issue as being one of whether the applicants meet the minimum qualifications for the job. Be that as it may, we have, I believe, furnished you with all of the requested information.

It is unfortunate, perhaps, that matters such as psychological aptitude tests and the theories behind the tests cannot be understood by all lay people; however, that is not the issue in the case. I am sure that there are many people in management who do not have the expertise to understand and evaluate tests of this sort, and this, of course, is also true of officers and members of the Union.

I would suggest that if it is agreeable with you we plan on filing our briefs with the arbitrator by August 20 as I earlier indicated. In the meantime or even after that date,

perhaps a decision can be made as to whether or not the arbitrator should render his decision before the NLRB acts or vice versa. In either event, we might as well file our briefs so that the record is complete.

If you have any further thoughts on this or would like to meet with me regarding the course of action to be pursued, please let me know.

Very truly yours,

/s/ RALPH H. HOUGHTON, JR.
Ralph H. Houghton, Jr.

RHHjr/mz

cc: Prof. Dallas Jones
American Arbitration Association

REPLY—xerox made 7/23/73
To: RALPH H. HOUGHTON JR.

FROM: CLEM LEWIS—

After talking with you today, I think we can probably proceed as you suggest. However, we both want to cover all the bases and I will think a little about it all and try to see you next Friday afternoon 7/27 3pm or 4pm and maybe we can execute a little note protecting the interests of each. My problem is, and it is yours also, what NLRB will do on the 'disclosure' issue; and what the arbitrator himself could do on the 'disclosure' issue. And, as you said, and I previously opined, NLRB might make the 'disclosure' issue a Collyer case.

But, in general, I agree with you that we can file briefs and still preserve these questions—and we should while the testimony and exhibits are still fairly fresh, and not stale.

So I will either write again, or telephone, or, as I say, visit with you next Friday afternoon. At that time, we can advise Professor Jones and AAA if we have agreed on a date such as August 20th, or slightly thereafter, for filing briefs.

General Counsel's Exhibit No. 10

FISCHER, FRANKLIN & FORD
Attorneys and Counsellors

1700 Guardian Building/Detroit, Michigan 48226
Telephone (313) 962-5210

August 6, 1973

Mr. Clem Lewis
Utility Workers Union of America
1717 Grant Deneau Tower
Dawton, Ohio 45402

Re: Detroit Edison Labor Arbitration
PMO-123 and Pending NLRB Case

Dear Mr. Lewis:

Reference is made to our meeting of July 27, 1973, and your proposed agreement regarding the filing of briefs in the arbitration matter.

I have reviewed that statement and also given consideration to the discussions we had, and I believe that I am correct when I say that we are in agreement that we should go ahead and file briefs and, further, that the arbitrator should rule. However, you wish to protect your position with the National Labor Relations Board so that in the event the arbitrator rules in favor of the Company you will still be free to pursue your case before the NLRB.

In the event the NLRB issues a decision prior to the arbitrator's award, then I think that will be controlling regardless of what the arbitrator might rule on the disclosure issue. In any event, as Mr. Ruch and I advised you at our meeting, if either the NLRB or the arbitrator should rule that the Company is required to disclose the actual tests, we would find it necessary to make a court case out of such a decision.

Taking all of the above into consideration, I have drafted a proposed letter to be sent to Arbitrator Dallas Jones, a copy of which can also be sent to the National Labor Relations Board if you so desire. I believe it satisfactorily protects the positions of both The Detroit Edison Company and the Utility Workers. If the letter meets with your approval, please sign it and forward the original to Professor Jones with a copy to my attention. If you have any questions regarding the letter, give me a telephone call so that we can try and work them out.

Thank you for your attention to this.

Very truly yours,

/s/ RALPH H. HOUGHTON, JR.
Ralph H. Houghton, Jr.

RHHjr/mz

Enclosure

cc: Mr. Emil Ruch

General Counsel's Exhibit No. 11

NATIONAL HEADQUARTERS

Grant/Deneau Tower, Dayton, Ohio 45402

August 9, 1973

To: PROFESSOR DALLAS L. JONES, Ann Arbor Michigan
RALPH H. HOUGHTON, JR, Attorney

From: CLEM LEWIS, UWUA AFL CIO

Subject: Detroit Edison Arbitration with Local 223
UWUA AFL CIO
Grievance PMO-123 AAA Case 5430 0720 72

I am transmitting to Professor Jones a copy of Ralph Houghton's letter which, in effect, sets forth some ground rules for filing briefs in the above matter, and continuing the case, if warranted, based on other speculative actions. It is not precisely the proposed agreement I served to Mr. Houghton and Detroit Edison on July 27th 1973 but it will do.

One passage of Mr. Houghton's letter is worthy of note, however. It says "if Mr. Lewis desires, he can always ask the NLRB to review . . . . the arbitrator's decision on disclosure . . . . . in order to determine whether or not it is consistent with the policies of the Act".

Actually, I asked the Arbitrator to order or subpena disclosure based on his role as Arbitrator and/or within to order disclosure based on 'the policies of the Act' and the Arbitration rules. On the other hand, I asked NLRB Board precedents. One is not necessarily contingent upon the other, nor are the criteria and rules necessarily the same.

As I understand the Collyer doctrine at NLRB, if a charge is filed and the Board defers to an arbitrator within the arbitration terms of the contract, then the Board retains some type of jurisdiction and does not close

the case. If an arbitrator orders disclosure, in connection with a case, I do not believe the Board feels the same is persuasive or controlling on it; or, on the other side, if the arbitrator fails to order same, the Board still may do so. In other words, the Board effects the policies of the Act; the Arbitrator does what is needed for the particular arbitration itself.

My arguments, on disclosure, in the brief for the arbitrator might or might not be the same as my arguments on the subject before the Board; it is two different tribunals—one performs a contract; the other performs a Law. But , as I say, let us begin—I will agree to the filing of briefs by September 5 1973.

/s/ CLEM J. LEWIS
Clem J. Lewis

General Counsel's Exhibit No. 12

FISCHER, FRANKLIN & FORD
Attorneys and Counsellors

1700 Guardian Building/Detroit, Michigan 48226
Telephone (313) 962-5210

August 6, 1973

Prof. Dallas L. Jones
831 Westwood
Ann Arbor, Michigan 48103

Re: Detroit Edison Arbitration With Local 223,
Utility Workers Union of America, AFL-CIO;
Grievance PMO-123; AAA Case No. 5430 072 72

Dear Professor Jones:

Mr. Lewis and I met in Detroit on July 27 in an effort to resolve certain questions regarding the filing of briefs and your proceeding to render a decision in this matter. Mr. Lewis has agreed that briefs will be filed on or before September 5, 1973, and also that you ought to proceed with a decision in the case both with respect to the disclosure issue, as well as the substantive issue involved in the grievance itself.

Mr. Lewis expresses concern that if you go ahead and render a decision on the disclosure issue, that that will somehow affect his position before the National Labor Relations Board. I advised him that in my opinion with the present case pending before the Board, he need not be concerned about waiving any of his rights. If Mr. Lewis desires, he can always ask the NLRB to review your decision in order to determine whether or not it is consistent with the policies of the Act.

Mr. Lewis' primary concern seems to be this: If you should render a decision in favor of the Company both with respect to the disclosure issue and the substantive issue in the grievance and then the NLRB or the court, as the case might be, should ultimately order the Company

to disclose the actual tests themselves, then in that event Mr. Lewis desires to have the opportunity to reopen the arbitration case in order to review his position after he has had a chance to see the actual tests. Within those limited circumstances; that is, if the Company ever in fact is ordered to disclose the tests and does in fact disclose the actual tests as a result of a final court order, then I would be agreeable to having the arbitrator listen to any additional argument or evidence based upon the disclosure of the tests which might affect his decision with respect to the substantive issue in the grievance. This signed letter will suffice for that purpose.

In view of the fact that ultimate disclosure through a court test would take several months or possibly years, it does not make sense to hold up the arbitration decision for that amount of time. I feel the record is complete in the case before you, and you ought to decide the issues and then let the chips fall where they may with respect to the National Labor Relations Board case. I believe Mr. Lewis is agreeable with this procedure and, if so, he will sign this letter and forward the original to your attention.

Thank you for your patience and cooperation in this regard.

Very truly yours,

/s/ RALPH H. HOUGHTON, JR.
Ralph H. Houghton, Jr.
Fischer, Franklin & Ford
Attorneys for the Detroit
Edison Company
1700 Guardian Building
Detroit, Michigan 48226

ACCEPTED:

/s/ CLEM LEWIS
Clem, Lewis, for and on behalf of Local 223, Utility Workers Union of America, AFL-CIO
1717 Grant Deneau Tower
Dayton, Ohio 45402

General Counsel's Exhibit No. 14

NATIONAL HEADQUARTERS
Grant/Deneau Tower, Dayton, Ohio 35402
Code 513-223-0125

May 15, 1974

SUBMISSION QUESTION FOR RESUMPTION OF HEARING IN RE DETROIT EDISON ARBITRATION GRIEVANCE PMO-123 AAA CASE 5430 0720 72

WHEREAS: The above case was originally heard by Arbitrator Dallas Jones and

WHEREAS: The parties, Detroit Edison Company, as Management, and Local 223 Utility Workers Union of America AFL CIO, as Union agreed that the same arbitrator should hold jurisdiction regarding the implementation of the Award—and—

WHEREAS: There were some questions as to the exact submission for the resumption of hearing—

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

The precise questions which the Arbitrator will decide and which will be in front of the arbitrator is as follows:

"Whether the Detroit Edison Company has properly implemented the award in accordance with the opinion attached thereto"?

/s/ C. J. LEWIS
C. J. Lewis, for the Union

Respondent's Exhibit No. 1

MONROE POWER PLANT

First Step Meeting
PMO-123
February 22, 1972

REPRESENTING MANAGEMENT:	REPRESENTING THE UNION:
P. Murphy, Jr.	R. Sprayberry
F. E. Agosti	F. Domosic
F. J. Locke	B. Wright
W. L. Roskind	
W. J. Stromp	

UNION POSITION:

1. Violation of Article VIII, Section 38 and Article IV, Section 2.

2. Article VIII, Section 38: "If a vacancy occurs—a notice of such vacancy shall be posted for a period of five (5) days in the bargaining unit in which it occurs—division".

3. Both F. Locke and W. Stromp were informed at the time they were in violation because the vacancy was posted plant and department wide simultaneously.

4. The Union feels that Management then knew who all the applicants were and this is not fair to the plant personnel who applied.

5. Article IV, Section 2, the union feels this is to be a by-pass of plant personnel.

6. The Union believes that the men passed the test according to past standards.

7. They have the basic qualifications for the job posted.

8. The plant personnel should be promoted to the position (Instrument B).

9. PC-527 and 529 (Step 2) further substantiates the Union's position in this case.

10. The Union is only familiar with the test that classifies the results as acceptable, recommended and not recommended.

MANAGEMENT POSITION:

1. The plant personnel were given first opportunity before all other applicants.

2. Out of plant applicants were not received until after the test results of Monroe personnel were reviewd.

3. The PC-527 and 529 cases involved posted requirements of acceptable and recommended preferred.

4. These two cases were not based on test results, but outside experience Head and shoulders.

5. June 1970, the Technical Engineers realized that since background in itself was not sufficient for selection, a test that would better indicate aptitude was needed.

6. Since this test was a three (3) level test (acceptable, recommended and not recommended) it was decided to adjust the test to two level.

7. The test is the only tool available to evaluate individuals' aptitude.

8. This test was redeveloped by Employment Department and was available for use as of September 21, 1970.

9. The test is based on aptitude and not job knowledge.

DISCUSSION:

The Union was not consulted on this new test, and therefore, the Union feels it was arbitrary decision by Management. The Union also would like to know what the cut-off point is on the old and new test. Also, what is the difference between the two tests. The point of acceptability is arrived at through the use of a formula, there is not a percentage score as such. The present test is the same except for the 12 minute section on personality. The test was remodeled to the present two level from the three level and the cut-off point was adjusted. This adjustment was validated through a sample of 33 employees presently performing the work as related to their test results.

The current terminology applied to the test results are: acceptable and not recommended. The Union feels the new cut-off point used by Management is not only unfair, but unknown. The unfairness developing from the cut-off point being raised. Management feels that employees who were in the previous gray areas, were the lesser capable persons. This was determined by comparing their test results to supervisors work performances of the individuals.

The Union stated that the present men on the job are still on a trial period, therefore, the six senior men at Monroe should be given the opportunity to demonstrate their abilities in the classification. Employment did agree that the cut-off point was their decision but only after reviewing all necessary data and performance reviews of individual performing within the job. The Union asked if employment would furnish scores of the Monroe personnel. Management felt that furnishing the results would not accomplish anything.

The applicant who had previously been rated acceptable was re-evaluated under the present system and found not recommended.

Mr. Murphy will answer in writing.

M. J. Stromp

xxx/xx [illegible]

Respondent's Exhibit No. 2

Production Department—Monroe Power Plant
February 25, 1972

Memorandum to:
Mr. R. Sprayberry
Chairman—Monroe Division
Local 223, UWUA, AFL-CIO

SUBJECT: *Grievance PMO-123—First Step*

I have reviewed the facts as presented by the Union and Management on grievance PMO-123.

It was agreed by Management that Article VIII, Section 38, was not followed. Posting of the instrument Apprentice job was made department wide. However, it is my understanding that when this was pointed out by the Union, a verbal agreement was made that plant applicants would be reviewed and tested before any other applicants was reviewed. I have been assured that this procedure was followed.

Mr. Locke, Technical Engineer, requested on the bid, that applicants acquire a rating of "recommended" on the Aptitude test as given by the Employment Department. The Aptitude test being used by the Employment Department to test applicants for this job was reviewed, revised, validated and made available for Department use September 27, 1970.

Mr. Roskind of the Employment Department has assured me that validation of the test, and establishment of the acceptable score for determining successful applicants, is justifiable. Further, Mr. Roskind informed the union and Management that scoring on the present test is either "acceptable" or "not recommended". The present acceptable rating is slightly lower than the former recommended rating.

Therefore, I must deny this grievance.

/s/ Paul Murphy, Jr.
Paul Murphy, Jr.
Superintendent

Respondent's Exhibit No. 3

Minutes of Grievance No. PMO-123 - Step 2
Production Department—Monroe Plant

May 19, 1972

Representing the Union: Messrs. Baker, Dankow, Domosle, Johnson, Lovelady, Muegge, Wiley, and Wright

Representing Management: Messrs. Locke, Marchand, Murphy, Pence, Roskind, Stromp, and Thomas.

Statement of Grievance

Article VIII, Section 38, Vacancies. Posting Notices of; Article 4, Section 2—Disagreement between Union and Management.

The Union feels the testing procedure used was unfair in filling the six vacancies in the Instrument Shop. The bidders from Monroe Power Plant should have been selected. Restitution sought—the six senior men from Monroe be placed on the Instrument job.

Union Position

1. The Union reaffirms the positions as taken in the Step 1 meeting.

2. The jobs in question were filled from outside the Monroe unit. It is the Union's contention that had the bidding procedure been followed, the jobs would have been filled from within the Monroe unit.

3. Article VIII, Section 38 Par. A states: "If a vacancy occurs in any one of the beginning units covered by this Agreement and such vacancy is not filled by promotion or transfer within the group, a notice of such vacancy shall be posted for a period of five (5) days in the bargaining unit in which it occurs and a copy sent to a Union divisional officer designated by the respective division."

4. Mr. Murphy acknowledged the error in posting department wide instead of first posting within the Monroe unit.

5. Management has revised their testing and grading procedure in relationship to the instrument job. This was done without the knowledge of the Union.

6. These revisions and re-evaluations took place while the Conners Creek grievance were in progress and it appears that Management didn't act in good faith.

7. This job is a learning type job and should be filled with that thought in mind.

8. Management has denied the Union the test scores on the grievants. There can be no "head and shoulders" difference if a comparison cannot be made.

9. The Union attended meetings on training and learning that were offered to employes. A Mr. Kelly talked to the Union about the "DuPont" type training that is used at this plant. He stated that employes could progress at their own pace and it would be near impossible not to complete the course.

10. The Union would refer to Mr. Nugent's answer to PC-527 and 529.

> "After reviewing the facts presented by plant management and the arguments put forward by the union and relating them to the job in question, Instrument Repairman 3rd, I agree with the Union, i.e., since this is a starting job, possession of some higher education does not necessarily constitute a 'head and shoulders difference' in qualifications. Had the vacancy been for some job other than a starting job, such higher education as possessed by Mr. Cheaves would have established a 'head and shoulders' difference."

11. The Union is concerned with those employes who are just below the "acceptable" rating. There is some question

as to the head and shoulders difference between those employes and the employes who are just over the acceptable score.

12. Management was aware that there were additional applications from other plants, when they reviewed the applications from the bargaining unit. It is because of this that the Union feels the selection wasn't handled in accordance with the agreement.

13. Management can take the grievants under the trial period provision of the agreement and ascertain if they could do the job.

Management Position

1. Management reaffirms the positions and answer as taken in the Step 1 proceedings.

2. This was not a new testing procedure. It was the same basic test, only now the employe's standing was evaluated on the basis of two segments of the test rather than the old method of three segments.

3. The levels of grading the tests have been changed from "recommended, acceptable" and "not recommended" to either "acceptable" or "not recommended." The acceptable score would be rated slightly below the old "recommended" level.

4. There was a mistake made in the posting and the Union was well aware of the error and they agreed to proceed as Management had suggested. The bids from other plants were not reviewed or even seen until after the Monroe people had been tested and evaluated. None of the Monroe people were in the "acceptable" range of the test results.

5. The purpose of the test is to determine the aptitude of the applicants for the job for which they are applying. It is not an intelligence test.

6. Management doesn't use the trial period when the applicant doesn't possess the aptitude necessary to successfully qualify for the job.

7. In regard to Mr.Kelly's statement to the Union, it should be that if a person can read at the 6th grade level he should be able to pass the course. Mr. Kelly was speaking of a course not the fact that a man would be successful in a job classification.

8. The Union has asked for test scores, but they haven't named the grievants other than the senior men at the plant.

Disposition

Mr. Pence will answer.

/s/ D. G. THOMAS
Union Relations Department

DGT:ghh

Respondent's Exhibit No. 4

THE DETROIT EDISON COMPANY
2000 SECOND AVENUE
DETROIT, MICHIGAN 48226

PRODUCTION DEPARTMENT

May 24, 1972

Mr. Peter P. Johnson, President
Local No. 223, UWUA, AFL-CIO
2757 Grand River Avenue
Detroit, Michigan 48201

Dear Mr. Johnson:

SUBJECT: *PMO-123, Step 2*

The Union cites a violation of Article VIII, Section 38, Posting Notices of Vacancies and the testing procedure used was unfair in filling of six job vacancies in the Instrument Group at Monroe Power Plant.

The Industrial Psychology Division formerly reported three levels of performance on the aptitude test for Instrumentmen: recommended, acceptable, and not recommended. On September 21, 1970, the Industrial Psychology Division changed their method of reporting performance on the aptitude test to acceptable or not recommended. This was done as a result of revalidation of the test battery.

Management acknowledges that an error was made when the job was posted department-wide without prior posting in the plant only. The Union brought this matter to the attention of Management and agreement was reached with the Union that the bid would be processed in such a way as to have the same effect as if the posting had been made at the plant first before going Company-wide. This agreed upon process was followed. The Monroe Plant employes who bid on the job of Instrumentman were given full con-

sideration for the job prior to the employes from outside the plant.

Ten (10) Monroe employes applied and were considered prior to bids from employees outside of Monroe Power Plant. Nine (9) were scheduled to take the test for the first time under the new standards. Two (2) failed to show up for testing. The other (7) were tested and their test performance was evaluated as "not recommended". One man, Mr. Wiley, who was tested under the old standards was evaluated as "acceptable" under the old standards (prior to September 21, 1970). His test was reevaluated at the time of the bid in accordance with the new standards. His test was evaluated as "not recommended" based upon these new standards.

I have discussed Mr. Wiley's situation with the Industrial Psychology Division. They inform me that they would be willing to review his performance with him with consideration for reevaluation.

In view of the above, I find no violation of the Agreement and this grievance is denied.

Yours truly,

/s/ W. K. Pence
Assistant General Superintendent
of Production /

Respondent's Exhibit No. 5

The Detroit Edison Company
2000 second avenue
Detroit, Michigan 48226

August 29, 1972

Mr. Peter P. Johnson, President
Local 223, UWUA, AFL-CIO
2757 Grand River Avenue
Detroit, Michigan 48201

Dear Mr. Johnson:

Grievance No. PMO-123

The Union contends that the Company is in violation of the Agreement between the parties by the selection of applicants to fill a number of vacancies in the Instrument Shop at the Monroe Plant. Specifically, the Union claims a violation of Article VIII, Section 38, "Posting Notices of Vacancies".

This Section contemplates that job vacancies shall be filled by promotion or transfer within the group. Here, before any attempt to fill the vacancy from the group had been made, the Plant posted that vacancy across all the bargaining units of the Production Department. The error in not first attempting to fill the vacancies from employes of the group was properly brought to Management's attention. As a result, Management recognized the error and considered only those employes from the Monroe group who had applied. Management determined that all of the vacancies could not be filled from this group and only then considered applicants from outside that group. Thus, only the Monroe employes were considered in the first step and no employe's contractual rights were violated by the posting procedure.

A second complaint of the Union is that the men at Monroe were disqualified because of tests and the Company did not demonstrate a "head and shoulders" difference between them and those who were selected. They also point out that changes in the test standards were not discussed with them, nor were they informed.

A basic qualification is a standard that must be met before a comparative evaluation can be made on a "head and shoulders" basis. Basic qualifications include, among other things, attendance records, specific educational attainment, driving ability, physical abilities, specific experience, licenses, and meeting a test standard. In these areas, a person is qualified or he is not, and if he is not qualified, further consideration cannot be given. It would certainly be a disservice to all employes who do not apply for a position because they lack a basic qualification to give consideration to those who apply regardless of their qualifications.

In this instance, one basic qualification was that applicants have been found acceptable under a new test standard established in 1970 after the requirements for the position of Instrument Man had been restudied and reevaluated. It has been the custom to inform the Union of test revalidation studies, but in this case the explanation and information to the Union were inadvertently overlooked.

All of the grievants are from groups outside of the Instrument Shop and are applicants for a beginning position in a *new* work area. They all failed to meet the standard of acceptability established in 1970 for entry into the training job for Instrument Men at Monroe.

One man, Mr. Wiley, had met a standard under the old test levels but does not meet the present standard established as a result of the restudy and reevaluation of the job in 1970. He accepted an opportunity to be retested recently with the same results. He also throughly discussed his test results with the Testing Division.

It was evident that the Union does not have a complete understanding of test validation, establishment of standards, development of test batteries, and similar information relating to the Company testing program. To that end, I am directing that a meeting for Union Officers and Chairmen be arranged to enhance their understanding of the Company's objectives in the testing area. A mutually acceptable date will be worked out prior to November 1, 1972.

This grievance is denied.

Yours truly,

/s/ R. W. SCHLEICHER
R. W. Schleicher
President's Delegate

Respondent's Exhibit No. 6

LOCAL No. 223
UTILITY WORKERS UNION OF AMERICA, AFL-CIO

2757 GRAND RIVER AVENUE
DETROIT, MICHIGAN 48201
Telephone WOodward 1-2901

October 27, 1972

Mr. W. G. Meese, President
The Detroit Edison Company
502 General Offices
2000 Second Avenue
Detroit, Michigan 48226

Dear Mr. Meese:

In Re Grievance PMO 123

The answer of Mr. R. W. Schleicher, who acted as your Delegate in the above-captioned matter, is completely unacceptable to the Union.

Therefore, we are requesting that the American Arbitration Association proceed under its rules and the applicable provisions of the Contract extant between us to resolve this issue.

Yours truly,

/s/ PETER JOHNSON
Peter Johnson, President
Local 223, UWUA, AFL-CIO

CERTIFIED LETTER—RETURN RECEIPT REQUESTED

Respondent's Exhibit No. 7

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

THE DETROIT EDISON COMPANY

and

UTILITY WORKERS UNION OF AMERICA, Local 223

Grievance Number PMO-123

Case Number 5430 0720 72

Proceedings had and testimony taken before a Board of Arbitration (Dallas L. Jones, Chairman; Raymond W. Schleicher, Company Member, and Douglas McIlroy, Union Member) at the Pick-Fort Shelby Hotel, Detroit, Michigan, on Wednesday, May 23, 1973, commencing at 9:30 a.m.

APPEARANCES:

FISCHER, FRANKLIN and FORD, 1700 Guardian Building, Detroit, Michigan 48226

Appearing for the Company

By: RALPH H. HOUGHTON, JR. Esq.

By: CLEMENT J. LEWIS, Director of Services, UWUA-AFL-CIO, Grant Deneau Tower, Dayton, Ohio 45402
Appearing for the Union

• • •

[12] (By Mr. Houghton) It was posted one time. The bids were received and initially only the Monroe Power Plant people were considered. And then ultimately, because they were not found qualified, the company did go and consider bids from other power plants in the system. I would point out that ultimately in this case the employees selected to fill these vacancies were from other plants. They were all Detroit Edison Company union-represented people.

The people at Monroe that bid on the job were determined by the company not to meet one of the basic qualifications, and that is the issue in the case.

• • •

[16] Just prior to the posting for this particular job for the openings in Monroe, these particular tests had undergone a revalidation study by The Detroit Edison Company. Complaints had been registered regarding the caliber of people that were being received into the program based on the old testing procedure and as a result the entire battery of tests were reconsidered by the psychologists in order to determine whether the predictability in results could in any way be improved. As a result of those studies certain changes were made just prior to the posting of these jobs. The basic change was two-fold. First, one of the three tests was dropped so that the battery of tests consisted only of two tests. That is, all the people bidding for this job took two tests.

The second change was to make an alteration or change in the cut-off point or scoring. Rather than have the [17] old system of "recommended," "acceptable," and "not recommended," it was changed to a two-tier system with the feeling that that fine three-tiered discrimination couldn't really be made and wasn't getting the desired results, so that now under the procedure that was utilized in this case and in the future there is a two-tiered procedure, and that is "acceptable" and "not recommended." So you are either "acceptable" by the results of the test or you are "not recommended,' and those are the terms that are used in evaluating the particular candidates for these job openings.

You will note on the job notice the term "recommended" was used, and really that is not completely correct, because the tests that were being used at that time indicate that under the two-tiered system the terminology should have been "acceptable." Basically they are the same, but there is a slight difference. In fact, the difference in this particular case would work to the employee's benefit, for the "acceptable" category that we are talking about is actually slightly broader than the "recommended" category stated in the job posting so that anybody that actually met the "recommended" category in this job posting would in fact be "acceptable" under the new standards and in addition certain other people would also be considered. The "acceptable" category was broadened out.

• • •

[28] (By Mr. Lewis) The fourth item I want to bring to your attention is we don't have any dimensions on what is called "head and shoulders." I don't know what "head and shoulders" is. I don't think you do yourself. I don't know whether it is this much (indicating) or a wider space (indicating). I dont know whether it is the difference between 60 and 80 or the difference between 40 and 80, or whether it is the difference between A and B, or C and A, or B plus and C or whatever the case might be, using the academic method of grading, if you please. That's one of our problems in this case and it's been one of our problems n other cases here which we are going to bring you.

So our position is the tests are discriminative. Therefore, management is arbitrary and capricious. Management could give any form of tests to people and find the applicants to be "head and shoulders" above others depending on what kind of test they wanted to serve them. It is no problem at all if you want to aim at a certain predetermined result to get people who you will find to be "head and shoulders" above others or "head and shoulders" below others. It is a very simple matter just to go over your crowd and decide what kind of a test you want to give them.

• • •

We have no control over what is known as the cut-off scores. We don't know what they are. We don't know whether 80 is "acceptable" or 60 is "acceptable" or 40 is

"acceptable' or 90 is "recommended" or 80 is "recommended" or 60 is "recommended." We have no control over the correlations in the test batteries that Mr. Houghton spoke of. They are all somewhere up in the blue. Our men never see them. Our union [31] never sees them. They could be concocted or bought from vendors. They could have all kinds of scoring keys.

We don't know anything about them. We don't know what questions go into the tests or whether such questions are relevant. They could very well ask the boys something about Einstein's Theory. I'm sure they don't need Einstein's Theory to fix instruments, fix meters. They could very very well ask them about trigonometry or social science or law or business administration. I don't know what they could ask them.

Mr. Houghton says they are validated. Yes, I know. They are validated in somebody's mind, yes. They are not validated by the union. The validation is never even discussed with the union. It is served up to them finally. The product is served up to them, that's all.

For all of these reasons I went to the Labor Board and I filed a charge against the company that said I wanted the actual tests. Mr. Houghton told you the whole question here was tests, tests, tests. I agree with him. Largely he is correct. I don't think it's the total question, but it is nine-tenths of it, because if the man doesn't get by that test, he's not admitted to the training for the job. He's not admitted to a trial period on the job. It's an obstacle. It's an impediment, that test. Unless he gets by it, he's not going anywhere.

[32] So I said: If that is so, then I want the test. I want to see what the tests are. I want to see if they are asking the boys in the test questions like "Have you been beating your wife lately?" or "Have you joined the Moose Club or the Elks Club?" or "Are you a member of the Masons?" Let's see what the questions are.

Management said: No. We will not give you the tests. They are confidential.

So as I say, I went to the Labor Board. I asked the Labor Board to please give me the tests. Under the statutory rights of management to supply information, I felt we had it coming. As long as the tests were paramount in this issue —and Mr. Houghton says they are—then I want to see them. I want to see if there are some questions there which are absolutely ridiculous vis-a-vis fixing instruments and as related to repairing meters and gadgets. I think I have the right. That situation is pending. They haven't issued a decision on it yet.

• • •

[46] EMIL RUCH

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOUGHTON:

Q. Mr. Ruch, your name and position with The Detroit Edison Company? A. Emil Ruch, Director of Union Relations.

Q. When were you made Director of Union Relations? A. Last October.

Q. Prior to that time what position did you hold? [47] A. Union Relations Coordinator.

Q. And you held that position for approximately how many years? A. In that title on the order of a dozen years.

Q. And would you tell us for the record how many years

you have been involved with Union Relations at The Detroit Edison Company. A. More than 20 years.

Q. That encompasses both contract negotiations and the handling of grievances? A. It does.

Q. As well as day-to-day administration of the contract? A. It does.

Q. Mr. Ruch, your testimony in this case perhaps will be rather brief, but I would like you to address yourself to certain of the relevant contract clauses and explain for us the history of these clauses and utilization of these clauses, and in particular I would like to turn first of all to Article VII, Section 13.

When was the language that we currently find in the agreement first placed in the agreement? A. In its present form, and to the extent that it uses words like "significant difference" and "head and shoulders difference," this language was inserted in the contract for the first time in 1969.

[48] Going back down through the history, however, of things, the predecessor language to this language runs back a good many years. Prior to terminology like "significant difference" and "head and shoulders difference," the contracts for many, many years, going back to 1952, carried such language as "qualifications and abilities being relatively equal"; only then will seniority prevail.

Prior to 1952 we had still different language where seniority was uppermost and held a position in the contract of much greater strength than it has held since 1952.

Q. So we are sure that we understand the chronology of events in the development of this language, which is perhaps the key language in this case, would you trace for us the development of that language in this particular clause from 1952 to date, including demands that the company

or the union may have made with respect to changes, whether those changes were agreed upon. A. Well, going back to the 1950 contract, we had this type of language: "In promotion of employees covered by this agreement to unfilled positions within the same bargaining unit, seniority and qualification shall govern." That was 1950.

Going on into 1952, there was the first strike [49] by the Utility Workers, and coming out of that turmoil the company demanded and got a shifting emphasis from seniority to qualifications and abilities, and the language then took this turn and became this kind of language: "In promotion of employees covered by this agreement to classifications within the same bargaining unit, seniority will govern whenever qualifications and abilities of the employees being considered are relatively equal."

During the 1952 turmoil the union was demanding that seniority prevail entirely in all cases. Reading from the union's demands of 1952—I am reading from page 21 of their demands—their demand on this point was this:

> "All transfers and promotions of employees covered by this agreement, employees with the greater seniority shall receive preference."

So that the point here I am making is that the fundamental question that faces the Arbitrator here today is one that the parties have been quarreling about for many, many years. Today's grievance, as you see on the face of it, is to the effect that the senior employees should get the promotion irrespective of anything else. That is what the union was trying to get back in '52. Of course, they never got that or anything like it.

[50] Going on into the next point in history that bears on this subject, we come to 1961, and in 1961 the union

approached the same matter from a little different direction. Reading from their demands in 1961—I am reading from page 2 of their demands—the union stated it this way:

> "Amend this section—" speaking of Article VII, Section 13— "to provide automatic promotional trials for senior employees."

Going on then to the next point in history which bears on this matter, we come to 1966. In 1966 the union's demand—and I am reading from page 3 of their list of demands—on this subject went as follows:

> "Revise promotion factors so as to give greater weight to seniority where ability is sufficient and adequate as contrasted to being superior."

During the 1966 negotiations this subject was given an awful lot of attention and the parties at the close of the negotiations settled the question on the basis of the understanding that there would be a post-negotiations high-level committee which would discuss the subject of seniority versus abilities and qualifications in promotions. This high-level committee was to consist of, for the [51] management, two vice presidents, Mr. Leahy and Mr. Wagner, and two managers, Mr. Lundgren and Mr. Schwab; and for the union, Mr. Clem Lewis, present here today; Robert Reynolds, John Barman, Robert Fisher, George Eskro, Peter Johnson, today's president of the union; and Herbert Neatherton.

Following the 1966 negotiations and in line with this commitment, this high-level committee did meet and did discuss the subject of seniority versus ability and qualifications in promotions, and the company members of the committee submitted to the union a report dated November 18, 1966, addressed to the President of the local, Mr. Robert Reynolds at that time, and set forth a number of

items concerning the whole subject, and in particular item numbered 4 on page 2 of the document which reads as follows:

> "Aptitude tests will be used where they improve our ability to select well qualified employees. Where such tests are used for certain jobs, they are fully validated; that is, the studies have been made to determine that there is a definite relationship between performance on the test and later performance on the job. Such test results are reported to departments only in terms of whether or not applicants meet a specified standard. They are not used for [52] differentiating among qualified candidates. The union is informed of validation studies which are being made in groups it represents."

I read only this part of this document to point out that back at that time Mr. Lewis and other people in the union were attacking the company testing programs even then but that the company gave no ground to the union on the whole matter, and this was the end of the 1966 handling of the whole subject.

Going on then to the next point in history which has any bearing on the matter brings us to 1969. In 1969 the union demand on the subject was as follows, and I am reading from page 4 of the minutes of the first negotiating meeting, which was held on April 17, 1969. There the union stated their demand as follows:

> "Give senior qualified man a trial on promotions."

The point of their demand again was that people should be given trials irrespective of their potential or test or anything else. Any applicant should be put on any job he wants according to seniority and given a trial period. Of course there was no agreement to that at that time or any time, prior or since.

In the 1969 negotiations the parties shifted [53] from the language that was: "Seniority will govern whenever qualifications and abilities of the employees being considered are relatively equal" to today's language which gets into the "head and shoulders" and "significant difference" phraseology.

At the time of the 1969 negotiations and for sometime prior thereto, the management had become more and more aware of the fact that in the arbitration field, arbitrators were handling contracts that had language like our old language, speaking of qualifications and abilities being relatively equal, and deciding questions of whether or not two contenders were relatively equal in this manner: Unless there was—and the arbitrators were using terminology like this—a "head and shoulders difference" or a "significant difference," then the conclusion ought to be that they are relatively equal. So from the standpoint of the corporation, this shift from the old language to the new language was more a shift in phraseology than a shift in substance.

The next point in history where the parties got into the matter would be in 1972. In 1972 the union approached the subject in this way, and I am going to read from minutes of the 1972 negotiations, these minutes being the minutes that were widely distributed to all the union [54] officials and to the membership-at-large and two supervisors in the company. I am reading first of all from the minutes of the second meeting, which was held on April 20, 1972. There the union stated its demand on the subject as follows:

> "The union shall be furnished copies of all tests given to employees. Union shall have the right to review all test results. All tests shall be job related and only for the job or position applicable."

At that particular meeting on that day the union was reciting its demands and the corporation was not replying or responding at that time, just trying to get a feel for what the union was driving at in all its various demands.

So we go on to the seventh meeting, which was the first time that the parties got back to that subject. I am reading from the minutes of the seventh meeting, which meeting was held on May 9, 1972. I am reading from page 5. There the opinions reflect this:

> "Management cannot accept this proposal by the union. To do so would destroy the testing program. It is the company's position that all of its tests relate to the job classifications [55] for which they are used. In answering a question from the union, management stated that test results do not come under the purview of Article VIII, Section 32. This has never been done and it is not management's intention to do so.
>
> "The union feels that it represents the employees and therefore it should be privy to the test itself and the test results. The union cited an example where Underground Lines employees failed a test enmasse, but upon taking the test again, several of the employees passed. Management cannot divulge tests or test results to people who are not qualified to interpret them. To release such data would destroy the integrity of the test itself.
>
> "The company's tests are accurate and have been validated. To prove this, the company is now engaging an outside source to study the tests and confirm their validity. Presently the Department of Justice is examining the company's test. The company believes in its testing program and is more than willing to discuss its testing program with the proper authorities and/or qualified personnel. Otherwise it is not.

[56] "The union inquired as to the possibility of an employee taking a test over again after having failed it once. Also in the Production Department. The union has been informed that the latter department administers a test that covers not only the APPO classification but other classifications as well.

"Management stated that as a rule an employee is not allowed to take a test over upon failing it initially. However, there may be extenuating circumstances where an employee would be allowed to take a test over again, but these cases are evaluated on an individual basis. Also the union must remember that the results of a test may be only one of the criteria used to evaluate an individual. That is, other factors are considered; that is, attendance record and so forth."

The next time that the parties got back to the subject was at the eighth meeting in 1972. Again I am reading from the minutes this time of the eighth meeting, which was held on May 11, 1872. I am reading from page 2. Here the minutes say:

"Management stated that with respect [57] to an employee being retested after having initially failed a test there have been occasions where an employee was allowed to take the test over again. However, these cases are handled on an individual basis only. Over the years, the company's tests have been designed by competent professional psychologists. The company's psychologists are ready to discuss an employee's test results with the employee on an individual case-by-case basis.

"There are some psychological tests (aptitude tests) that can be taken over again and the results would not change. Each case with respect to retesting has to be evaluated individually. There are cases where retesting is not advisable.

"In answering a question from the union, management stated that at one time the instrument repairman job classification tests contained three levels of recommendations; that is, 'recommended,' 'not recommended,' and 'acceptable.' This was changed to two levels, 'recommended' and 'not recommended' because the job has changed somewhat over the years. All our tests are validated in [58] accordance with the most stringent professional standards.

"The union does not agree that retesting should be on an individual basis. The union represents the employees and therefore the union should become involved with the determination as to when and if an employee should be retested. The company's tests do not consider the 'head and shoulders' concept, nor do the tests compensate for an individual's background. The union feels that, generally speaking, the company's testing program is not job related; that is, a test that measures academic knowledge, when the job itself involves manual labor. The union knows of instances where an employee has failed the test and has performed successfully on the job. Also the union knows of instances that occurred one and a half years ago where employees were denied an opportunity to be retested.

"Management stated that the company was willing to consider each case on an individual basis as each case would be different. It is the company's position that its tests are highly professional, administered by professional [59] personnel, objective and job related. Management is willing to have Dr. Worbois discuss this subject further with a union committee. The union stated that it would consider this."

For the record I should explain that Dr. Worbois is one of the industrial psychologists employed by The Detroit

Edison Company and is the director of that division of the company.

The next time the parties got back to this subject was at the ninth and tenth meetings. There we have a combined set of minutes. The tenth meeting was held on May 18th, at which time this subject was discussed again, and I am reading from page 5 of the set of minutes for that meeting, and there the minutes say:

> "The union maintains its proposal and reaffirms its position regarding this proposal as stated in the minutes of the seventh and eighth meetings, dated May 9 and May 11, pages 5, 6 and 2 respectively.
>
> "Management reaffirms its traditional position, which is that nothing in the contract gives the union or the employees a right of access to employment tests or results. Management is willing to discuss the integrity of our [60] testing program with fully qualified professional experts."

The next time the parties got back to the subject was on May 25 at the twelfth meeting. I am reading from the minutes of the eleventh and twelfth meetings, page 2. There the minutes say:

> "The union would be interested in hearing Dr. Worbois explain the company's testing program sometime after negotiations."

The matter as far as the negotiations then was dropped at that point. The union tried in negotiations to get management to turn over test questions, and the union failed in that attempt.

In conformance with the understanding which was reached in the negotiations, there was a post-negotiations meeting in the fall of 1972 at which Dr. Worbois, Mr. Roskind, a number of people from the corporation's Union Relations Department, all of the union chairmen of Local 223 had a full-scale discussion of the company's testing program and at which meeting the corporation, particularly in the person of Dr. Worbois, laid itself open with complete freedom of exposure to questions raised on the floor and answered by Dr. Worbois in the main, but also by Mr. Roskind. As a result of the 1972 negotiations then, were there any [61] changes in the contract in this regard? A. There were none.

Q. Is there now, Mr. Ruch, or has there ever been any provision in the contract that allows a senior applicant the right to a trial period on the job prior to selection? A. There is not now and there never has been since 1952.

Q. There is a trial period mentioned in the contract, is there not? A. Yes, sir.

Q. What does that address itself to? A. It addresses itself to the situation where after selections have been made, after "head and shoulders" aspects have been considered, after men have been selected, sometimes junior men, sometimes senior men and after the appointments have been made, then the successful applicants are given a trial period.

Q. Just for the record, where do we find the contract language that we read in conjunction with Article VII, Section 13 regarding the posting procedures and so forth? A. Article VII, Section 13 should be read in conjunction with Article VIII, Section 38.

Q. And that latter section then spells out the posting procedures and requirements? A. Yes, it does.

[62] CROSS EXAMINATION

BY MR. LEWIS:

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[63] Q. I see. Does the company give every employee who it promotes to a job a test? A. No. It applies and

uses tests only where it has tests which can be sensibly used and applied.

Q. Sensibly used? A. And there are situations where tests are not used.

Q. For example? A. I can't cite specific examples. Someone else who will testify after me will be in a better position to answer that question. But the point of it is that we use what we can and what is available to us to make the best possible judgments we can in making selections of employees. In some areas we are better equipped than in others.

Q. Well, is it possible, for example, that many instrument men were promoted in this company without ever having taken a test at all? A. It is possible.

Q. Is it possible that employees of this company were promoted to all kinds of journeymen jobs in the past without ever having taken a test? [64] A. Yes.

Q. Do you know that they have? A. Restate your question. I don't know how to answer it.

Q. Well, do you know that there have been countless employees—I don't know how many—promoted to journeyman-level jobs in this company without taking any test? A. There have been employees promoted to journey-man type jobs without having taken psychological tests.

Q. This grievance was filed, I believe, January '72; is that correct? A. Yes.

Q. Now, you said in 1972 that the union leaders had a meeting with Dr. Worbois about the whole general atmosphere of testing. Is that correct? A. Yes.

Q. Was this meeting before this grievance or after this grievance? A. It was after the grievance was filed and it was after the 1972 negotiations.

Q. Let me get that straight. Dr. Worbois' meeting was after the grievance was filed? A. And after the 1972 negotiations.

Q. Dr. Worbois didn't address himself to this specific grievance, though, did he? [65] A. No. The meeting with Dr. Worbois came about as a result of the 1972 negotiations, and the subject of these particular tests concerning the instrument men was thoroughly discussed at that meeting, but beyond that the whole general subject of psychological testing was thoroughly discussed.

Q. Now, you say that some of the union demands in the past have been that the union wants all tests and all test results; is that correct? A. Yes.

Q. You realize that in this particular situation we are not looking for all tests and all test results; we are looking for the tests and results concerned with just this grievance. Do you realize that, Mr. Ruch? A. If you say so. I'll leave that to you to establish.

Q. All right. We are. A. I really don't every very often know quite what all Clem is asking for.

Q. I think your discussion was kind of a rambling story, really, rather than a direct answer to questions and I think it dealt with general negotiations, generalities in negotiations; that the union wants all promotions made on a certain level or a certain way, wants all tests and all reviews. Isn't this what you were talking about? You weren't addressing yourself to a particular case, were you? [66] A. No, I was not.

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[74] What is "head and shoulders," mathematically speaking? A. There is no mathematical definition.

Q. What is it from the standpoint of grading people? A. With respect to this case?

Q. Any case. A. Well, if I can answer the question by bringing it home to the facts at hand——

Q. All right. A. ——we have a "head and shoulders difference" between two employees when one employee on the psychological testing tests out as "recommended" or "acceptable" and the other contender tests out as "not

recommended." There is a good example of our having then a 'head and shoulders difference."

Q. There are no measuring sticks? Is that what you are saying? A. No, that's not at all what I said. You weren't listening, Clem.

Q. I thought I was. You said they test out to a point of being "recommended" or "not recommended." Is that what you said? A. You asked me a question and I——

Q. How do you grade the expression "head and shoulders difference"? A. Well, I used the example bringing it home to the case at [75] hand. Your question was along the lines of under what circumstances do we have a "head and shoulders difference," and I used the illustration of the facts of this case to say that we have a "head and shoulders difference" between two contenders when one rates out on the psychological tests we are talking about here today as "acceptable" or "recommended" and the other contender rates out as "not recommended." I said that there is a good example of our having a 'head and shoulders difference" between two contenders.

Q. But aren't you being vague in a sense or it is a vague territory we are in? A. I don't think I'm being vague in a sense and I don't think it's a vague territory we are in.

Q. Well, conceivably suppose somebody has 50 and another has 60. If we use arithmetical grading systems, is this a "head and shoulders difference"?

MR. HOUGHTON: How could he possibly answer that. 50 or 60 what? We've got to relate it.

MR. LEWIS: Percentage.

MR. HOUGHTON: Percentage of what?

MR. LEWIS: In a test.

MR. HOUGHTON: Percentage of right or wrong or percentage of what?

[76] (By Mr. Lewis) In the old days, when people went to school the teacher said you got 80 in the test, you got 70 in the test or you got 65 in the test. Now they say B plus and B and A and so forth. What would in your opinion be a "head and shoulders difference"? A. Well, if the difference between 50 and 60 means a difference between pass and fail or a mark of A versus a mark of B or particularly a mark of maybe C and D or D and E or pass and fail, then we are getting into "head and shoulder" differences and "significant" differences.

Q. Let me understand you on that now. Let's suppose the passing mark is 50. You are saying that one having 49 and another having 51 would constitute a "head and shoulders difference"? A. Yes, I'm saying that.

Q. And was that the intent of the parties when they wrote that section? A. Yes, it was.

Q. Then as narrow a space as that was "head and shoulders difference"? A. It was the intent of the parties that lines would be drawn and some would fall on one side of the line and others would fall on the other side of the line because everybody recognized at the time that that's life.

[77] Q. And are the lines generally known to people when they take these tests? A. Yes, they are.

Q. Are the lines known to the union? A. Yes, they are, the "line" being if you want to make out and succeed, you've got to come out with a "recommended" or "acceptable" rating. Otherwise, if you should come out with an unacceptable rating, you are not going to be accepted in the application for the job.

Q. You are not following me. A. I'm following very well.

Q. Is the line of 50 in my hypothetical grading system known to the parties when they take the test? A. I can't go along with you on your hypothesis because I don't know what you have in the back of your mind so I can't talk in those terms. But if 50 is the line that says those on

one side of it pass and those on the other side fail, then the employees know that in the tests they either passed or failed. To this extent they are informed that they made the grade or they didn't.

Q. You say the applicants are told that at the time they take the test? A. Well, they are told when they apply for the job, if you are talking about the case in point, that they must have an [78] 'acceptable'' or ''recommended rating on the test.

Q. And that hypothetical 50 is a grade that you must attain or whatever it is? A. They are told that we have a hypothetical 50. Clem, I'm not going to get drawn into a loose use of terms here.

Q. They are not told that, in other words, nor is the union told that?

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[94] But, Mr. Ruch, isn't the psychological testing the key and the crucial criteria in the whole promotion scheme in this [95] case that we are heretoday? A. Yes, it is.

Q. And isn't it by and large that in many of the cases now you cannot get admitted to training or a trial unless you get by that? Isn't that correct? A. That is true.

Q. And you don't even bother to examine physical condition, work history and disciplinary actions and everything else until the man first passes the aptitude or psychological test; is that right? A. That is true.

Q. What you are saying now is that the psychological test in general usually precedes all these other things? Is that what you are saying? A. Well, I'm not saying in what particular order we put these things, how we look at these things, but the practical man in looking at the various aspects concerning various numbers of contenders would go about it logically and he may very well start with how these contenders made out on a psychological

test and eliminate some on that basis, and then go to another aspect and eliminate some more on that basis. And if he is a thinking person, he will start at a place which is somewhat logical, and he most often would probably start with how they made out on the psychological testing. [96] Q. Before he'd consider anything? A. Before he'd go on to some other things, yes.

THE ARBITRATOR: Is there any objection to this, Mr. Houghton?

MR. HOUGHTON: I don't know. I haven't examined all the rest of it. If you have made all the points you want from it, I don't think we need it as an exhibit, unless you want him to read that into the record.

I just don't know what issue the other questions and answers raise, frankly, until I study it.

MR. LEWIS: Well, on page 2 of the document, Mr. Ruch already testified here today pretty much the same as he did in this deposition on the question of how we got to ''head and shoulders difference,'' the language up to the present time, right?

MR. HOUGHTON: Correct.

MR. LEWIS: And more or less the chronology.

Q. (By Mr. Lewis) Down at the bottom of page 2 the question here asked: ''Again how often in your experience is a senior employee by-passed on the basis of this provision?'' That is the ''head and shoulders'' provision.

And you said: ''. . . not very often. I guess we said less than 10 percent or less than 5 percent, I would say on that order.'' Is that correct? [97] A. If you carry it in the same vein of precision.

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[110] LAWRENCE E. KANOUS

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOUGHTON:

Q. Mr. Kanous, would you give us your full name and position with the company. A. Lawrence E. Kanous, and I am the Director of Employee Training, Detroit Edison Company.

Q. How long have you been employed by The Detroit Edison Company? A. Since 1951.

Q. What group or department did you enter into in 1951? A. In the industrial psychology division of the Employment Department.

Q. Would you trace briefly your employment history from 1951 to date, explaining what job positions you have held and what general duties you have had in those jobs. A. I was hired into research assistant, industrial psychology [111] division at the outset and in that position was involved with various kinds of personnel research efforts directed at trying to improve the selection of various employees in various kinds of jobs; doing studies directed at improving safety conditions within the company. I also administered tests, counseled with employees who had taken tests, did research of that sort in that position; and then was subsequently promoted to research associate and then assistant industrial psychologist, and then in 1970 to my present position.

Q. Prior to coming with the Detroit Edison Company, will you tell us what professional training you had beyond high school. A. I have a Bachelor's Degree from Michigan State University in Psychology; a Master's Degree from the same university in Industrial Psychology.

Q. What, for our frame of reference, is the difference between the general field of psychology and industrial

psychology? A. I think I can best explain that by saying it is a similar difference as exists between the general field of engineering and the specific field of electrical engineering. Industrial psychology is a subdiscipline within the general field of psychology itself.

Q. And have you been working in the field of industrial [112] psychology during your tenure with the Edison Company? A. Yes, almost all of the time.

Q. Subsequent to acquiring your university education, have you had any further education, joined any professional societies or taken part in any activities of that sort? A. Yes. While employed with the company I completed all of the work required by the university at Wayne for my doctoral degree with the exception of the dissertation, and I am currently a member of the American Psychological Association, Division 14, which is the division of organizational and industrial psychology.

At the time that the Michigan Registration Act for professional psychologist was passed, I was certified as a certified consulting psychologist by the State of Michigan.

Q. You are licensed to practice and consult in the state of Michigan then? A. Yes.

Q. Mr. Kanous, after you came with The Detroit Edison Company, what job were you placed in at that time in terms of testing or determining whether certain batteries or groups of tests should or should not be utilized in connection with particular jobs? Did you carry on that function at all during your initial years? [113] A. Yes. At the outset I was given the task of revalidating some test batteries which had been developed prior to my joining the company in which there was reason to think that some significant changes had occurred in jobs and they were required to be restudied.

After that I was given an assignment in the Production Department to determine whether or not aptitude tests or

other devices could be used to assist in the selection of the kinds of individuals who should progress into the operating jobs in power plants.

Q. Now, in connection with those types of jobs, in later years did you ever have occasion to become a member of a task force that studied the layout for the instrumentation in some of the newer plants? A. Yes.

Q. And what did you do in that regard? A. Prior to the design of the Trenton Channel No. 9 Unit, the company had become aware that the complexity, the amount of control and display equipment that was proposed for that unit was of very significant magnitude, and it was the judgment of the company that some effort should be put to trying to design the plant, most particularly the control center of the plant, such that there was a good interface between the operator and his control and display equipment, [114] and also that the plant should be more maintainable in terms of the maintenance people's activities. That would include the instrument people.

Q. Was that same type of study or a similar study undertaken with respect to the Monroe Plant? A. Yes.

Q. Earlier in your testimony you referred to reviewing or validating certain tests that had been used by the company prior to your coming to Detroit Edison. A. Yes.

Q. Do you knew when psychological tests, so-called, or perhaps more correctly the standardized aptitude tests were first utilized by Detroit Edison and under what circumstances? A. Well, the very first one that I could find appeared about the year I was born, 1924. It was a set of tests which were developed and validated for a clerical operation in what was then our research laboratory. It was done by an engineer or scientist named Cope. And I might comment that that validation study, although not done by a psychologist, would stand up under professional scrutiny today.

Q. And thereafter did you determine or do you know when the standardized aptitude tests were first used for

the selection process for the instrument men? A. Yes. That would be somewhere around 1958. The first major [115] use of these aptitude tests appeared in 1928-29 when a set of tests was validated on the substation operator job by a Dr. Morris Viteles.

Between then and the beginning of World War II, some effort had been directed at this kind of thing to attempt to find validated measures of predicting performance on jobs but not a great amount.

Following World War II, because, I think, the company had determined that these were useful valuable devices, Dr. Worbois was hired just after World War II with the idea that we would have a more broadly based and intensive effort at the development of these for more jobs in the company than had been true up to that point. We had had in the years prior to World War II various consulting psychologists who had done work for the company: Dr. Ford from the University of Michigan, Dr. Viteles and others.

Q. Then I take it when Dr. Worbois was hired, a department or internal group of industrial psychologists was developed by the company? A. Yes.

Q. And you were part of that group? A. I came later, but it was developed around 1947. Dr. Worbois was in it for awhile. He was the head of it. I think there were one or two others. And by the time I had arrived on [116] the scene in 1951, there were at that time four people in the group.

Q. So in 1951 there was this group of four people, you came on the scene, and then approximately seven years later, in 1958, a battery of tests was first utilized by the company in connection with the instrument man job? Is that chronologically basically right? A. A validated test battery was used at that time, that's right.

Q. Before moving into some more specific considerations, I would like you to take some time, if you will, and

generally describe for us what we mean by validated. What does that term mean and what do you do to validate a test? What are you seeking to accomplish through a validation? How do you go about it? A. Well, the procedures are fairly generally accepted in the profession. The first thing that you do is to consult an analysis of the job itself. What is it that people do on the job? What sort of demands are made on the people by the job? What sort of tasks are they required to do and to what degree of effectiveness, and if there are time limits, how fast do they have to do them and all that sort of thing. You get a very detailed description of what is done in the job.

[117] Having that information, you then attempt to get some ideas about those kinds of aptitudes that might in fact underlie that performance. Having that captured, having a set of aptitudes that appears as though it might be underlying the job, you then select a set of standardized measures that might be used to evaluate the presence of those aptitudes in the job.

You do a second thing concurrently with this, and that is you develop a reliable measure of performance on the job so that you can in fact evaluate that a given individual performing the work is performing that work at a particular level: an acceptable level, not acceptable level, a very highly proficient level, whatever is a reasonable and logical way to separate out the incumbents on the job.

When you have these two things, a tentative test battery and the criterion, which is the evaluation of performance, you then ask a number of incumbents in the job to take the tests and you have the evaluation of their perforance as well.

The sets of measures are then subject to rather rigorous statistical procedures, mathematical procedures which seek to determine whether there is in fact a relationship be-

tween any of the performances on any of the [118] tests and the performance on the job.

The procedure essentially in and of itself indicates whether or not a test is related, correlational procedures or whatever you like. If indeed you find that some tests are reliably related to the performance measures, these are then selected out of the tentative battery of tests and further analysis is given to how should they be weighted. Should you give them simple unitary weights and just add them all up, or are some of them stronger predictors of the performance on the job or what? And this then leads you, again on a mathematical basis, to what is commonly referred to as a battery score, which is a weighted sum of the earlier raw measures, if you will.

You then apply the tests to predict some evaluations of performance which were not originally used to set up the weights.

So it is a two-step process. The weights are established on one group of people and then an attempt to predict the performance of a second group of people, using those weighted scores to determine whether or not the weights are actually valid and reliable.

At this point we can then say to the management or whomever it is that commissioned the study that we either have a useful predictor of performance on the job or we [119] do not.

Q. Now, as to whether or not a particular battery of tests is or is not a useful predictor, how do you state that usefulness? In terms of what? Is it a percentage? A coefficient? A particular mathematical term? How do you equate predictability in terms of numbers? A. Well, there is a mathematical number, if you will, or parameter which is referred to as a validity coefficient, and if that validity coefficient is sufficiently high, you may then say that the test is useful.

Now "high" is a sort of relative term in that it depends upon the importance of the prediction that you are going to make. the nature of the work that you are going to predict it in, the criticalness of it to the client. It depends upon the numbers of people that might be applying for the job at any given moment and a number of other things. It is a rather complex judgment rather than being a simple X percent—if it is X percent, it's good; if it is not X percent, it's not good. It is not that simple.

Q. Assuming hypothetically then you run your validation studies, you come up with this coefficient or indicator of predictability for the test and it is sufficient to meet whatever standards may be involved. Am I correct that you then at that point have a test that would be utilized by the client [120] or by the company for the particular use it was intended? A. Yes.

Q. Now, going back again, if we might, to your initial contact with these types of procedures, were you involved initially at all in determining what jobs within the company should or should not be subjected to aptitude tests? And if so, what criteria were originally established? A. Upon being, I guess, considered for being hired by the company, I was asked questions about why it was I wanted to job, as is done most of the time, and I was told by the then Director of Employment, Mr. Sullivan, that the company had two concerns in why they wanted this effort made, the first being that we should look to those jobs which have a critical bearing on the company's business first, and then equally at the same time those jobs in which there was a high or significant degree of personal hazard to the employees; that it is those kinds of jobs into which we should put our effort. Recognizing we couldn't take on all the jobs, we should begin to study those kinds of jobs first, and that has been what was going on prior to my joining the company as well.

Q. So subsequent to your joining the company, in the last 20 or 30 years then have test batteries been developed for various trades jobs within the company? [121] A. Yes.

Q. Do you know approximately how many? A. To the best of my knowledge, it would be approximately 20. That's give or take three or four.

MR. LEWIS: 20 what?

THE WITNESS: 20 different job classifications.

Q. (By Mr. Houghton) And the test batteries for these job classifications involve what types of tests? Are we talking about skill tests, aptitude tests, personality tests? A. In the main we are talking about aptitude tests, standardized aptitude tests, as distinguished from achievement tests or proficiency tests.

Q. Explain that distinction for us, please. A. A proficiency test is designed to measure your present level of skill in some areas; present level of skill in mathematics, present level of skill in music, present level of skill in whatever area you wish to talk.

An aptitude test looks, on the other hand, at the capacities that the employee has for developing skills. It does not look at the current level of skills that he has.

THE ARBITRATOR: May I interrupt for just a minute, please?

When you use the term "standardized test," are you speaking of a test which you would buy from a psychological [122] testing corporation or one which you have developed in the company and call a standardized test?

THE WITNESS: It could be either, sir.

THE ARBITRATOR: It could be either?

THE WITNESS: Yes. The process of standardization, however, in either case, whether we bought it from outside or developed it inside, would follow the procedures that the American Psychological Association recommends to qualify for that.

THE ARBITRATOR: But the term "standardized" is often referred to tests which are purchased; isn't that correct?

THE WITNESS: Some folks do refer to it that way. I'm speaking about as a standardized test those kinds of tests which have had the processes of determining item validity, reliability and that sort of thing and meet the American Psychological Association's criteria for such.

MR. LEWIS: While the Arbitrator interrupted here, you said test batteries have been developed for 20 jobs?

THE WITNESS. 20 different, if you wish, job areas.

MR. LEWIS: 20 job areas?

THE WITNESS: Yes, like power plant operations, instrument many, lineman.

MR. LEWIS: Did you understand that, sir?

[123] THE ARBITRATOR: Yes, I did.

Mr. LEWIS: Job areas.

THE ARBITRATOR: He said job classifications previously.

MR. LEWIS: Is it job classifications or areas? That's a big difference, isn't it?

MR. HOUGHTON: Why don't you save some of this for cross if you are concerned about it?

MR. LEWIS: I'm trying to understand it so I can cross examine.

MR. HOUGHTON: Is it classifications or areas?

THE WITNESS: Classifications, I suggest.

Q. (By Mr. Houghton) Turning to this point of standardizing a test—and I will use the term standardizing a test as opposed to a standardized test—you mentioned the American Psychological Association and certain recommended standards. I will ask you first of all have the aptitude tests that are used by the Edison Company been

equated to those recommended standards and standardized in accordance with those standards? A. Yes.

Q. Is that true of the battery of tests involved in this particular case? A. Yes.

[124] Q. Tell us if you will what those standards are, what they mean and how we end up with a so-called standardized test. A. Do you wish me to go through the process of how that is done, or what shall I——

Q. First of all you might identify the criteria that are used as standards. In other words, you stated the tests have to have reliability. A. Yes.

Q. I assume there are some other standards. What are they and what do you mean by each of those standards, first of all? A. Well, not only do you have reliability, but there has to be some research demonstration of that reliability in the manual that has been prepared.

The scoring system for the test has to be explicit, demonstrated. The method for the test administration must be explicit and demonstrated. Those are the main kinds of things.

Q. So there are three basic standardized criteria that are used. Let's go back to the first one, reliability. What is reliability and how do you measure that? A. Reliability is very simply the degree to which a test given to an individual produces the same score on multiple takings of the test. If a person takes the test more than [125] once, if it is a reliable test it produces essentially the same score on other occasions, all other things being equal.

There are two ways to test this, and one is to actually give the test twice with an interval in between. The other is to use a procedure in which you give what amounts to a double-length test and then split it in half randomly and test one half against the other, and if a test is reliable, the score achieved on one half will in fact be the same level as the score achieved on the second half.

Q. Let's use an example if we can and let's speak in terms of the instrument man battery in this case which you

told us are aptitude tests and not skill tests. Am I correct then if I were applying, myself, for the instrument man job and I took those tests tomorrow and I passed them and I went into the job; four years later, after working as an instrument man, I went back and took that same test again, my score, if it were a reliable test, would be the same? A. Yes.

Q. And why is that? A. Because again we are testing aptitude rather than skill. What would develop hopefully while you were on the job is that you would be able to enhance your skills. You would not likely alter your aptitudes for the development of those [126] skills.

Q. And I presume then when you are seeking to determine the reliability of a particular battery of tests, there are various statistical measures that are used in order to determine that reliability? A. Yes.

Q. One of the other two factors you stated in standardizing tests has to do with a scoring procedure. I believe you said there has to be a standardized clear-cut type scoring procedure. A. Yes.

Q. What do you mean by that? A. Well, obviously if you did not have a specific procedure by which the tests were scored and different scores used in different procedures, you would then obviate the reliability of a test. So one of the criteria of a properly developed test is that the scoring procedure is explicitly stated, and the test is only reliable, only useful insofar as those procedures are indeed used.

So if you use a scoring key or however you do it, whatever scoring formula is used, that must be used religiously for the test.

Q. And the third criterion for standardization you mentioned was what? [127] A. I'm not sure of the order I put them in.

Q. We have talked so far about reliability and scoring and there was a third area. A. The norm system, a manual full of norms.

Q. And what do you mean by them? A. This displays what kind of groups took the test so that a score achieved by a given individual becomes meaningful, and that also must be available in order to meet the criteria of the Association.

Q. Now let's assume that we have a so-called test that has been standardized, meets all of these basic criteria and these criteria have been mathematically demonstrated and you go about giving that test, and assume for example we are talking about a mechanical aptitude test. If that test is validated at a company up in Minnesota for a particular job, can that validation and that test be used by Detroit Edison Company for instrument man or is there a further validation that is needed? A. The latter is the case.

Q. Why is that? A. Because many times that company up in Minnesota may refer to a set of jobs as covering those of instrument man or whatever and those job tasks may not be the same as those that exist in The Detroit Edison Company.

[128] There may be a very significant difference between what is called instrument man in Company A and what is called instrument man in Company B and it is critical as to whether or no you are predicting against the job tasks, so that while in a research of this nature what you would do is to look around at who else has used this test to predict this sort of thing, you just simply do not then put it into effect in this company. You do conduct a research to demonstrate that it has validity here in this context.

Q. So if one were to walk into a store which sold psychological tests and there were a series of aptitude tests and you bought those off the shelf, before you could use them in a particular job situation in a particular company, you are saying it would be necessary to have a validation of the test with respect to that job? A. That is correct.

Q. Let's go forward and I will ask you to tell us what steps were taken in around 1958 when it was determined by

someone that standardized aptitude tests would be utilized for the instrument man job. What was done at that point by the company and how did you go about validating or selecting tests that would be used? A. I think, if I may, it is perhaps useful to go back a bit beyond 1958, earlier.

[129] Surely. A. In about 1952 I began to do this job with respect to the validation or determination of whether or not a valid set of tests could be produced for power plant operators and as a part of that job, of the whole piece of research, we, of course, looked at where do we get people into the operating groups? What do they do from the time they start until the time they leave operating? And what sorts of other jobs are related in some way to that?

One of the things that we noted was that one of the avenues out of the operating group was the instrument group and also the plant service group or maintenance group at that time, and also the movement from operating to the instrument group was based essentially on a seniority kind of a consideration.

We were asked at that time to take a look at whether or not the instrument job and the operating job in fact lay on the same ladder, if you will. Are they in a normal progression, one from the other, or do we have more than one ladder? We did some evaluation and looked at that and the evidence seemed to indicate to us that there was a separate ladder for the instrument group, and that is that the job in fact made different kinds of demands on the [129] incumbents than does the operating job and that therefore it was not a good procedure, in our judgment, without some screening to have people moving across to the other job.

At that point the then Production Department asked us to proceed with the development of a set of tests which might be used, if it worked out that way, to predict success in the instrument job. So we did then again an analysis of the kinds of things that instrument people do. What sorts of demands does the job make on them physically, emo-

tionally, intellectually, and attempted to secure a set of tests which might be predictive.

We also looked in other parts of the industrial scene in the United States as to what had other people done, other psychologists, where there was a job which had similar duties, similar demands; other parts of industry: process control industry, petroleum industry, drug industry and so on where they had process control instrumentation and people who were maintaining and troubleshooting on them.

The upshot of all of that looking was that there were about four tests that looked as though they might have some possibility of being predictive within the job in The Detroit Edison Company. Out of those four, three were picked to be put into a validation study. We did that approximately '56 or '57. We had incumbent instrument men take the test.

[131] Let's stop just a second here so we are clear now. At that point you through your inquiry narrowed the scope down to four tests. Were these standardized type tests that were available? A. Yes. I said we picked four. The fourth test was not used. We had at that time some question about the adequacy of its standardization. That is why we didn't use it.

Q. What were the names of the three tests that were used, if they have a name? A. The first was called the Wonderlic Personnel Test. The second is the Minnesota Paper Form Board. The last is the Engineering and Physical Science Aptitude Test.

Q. Is the last test sometimes known as EPSAT? A. Yes.

Q. Now, these three tests, just so we are clear on where they came from, are these tests that are sold by psychological testing outfits or groups to professionals? A. Yes.

Q. And once you receive this type of test, then, I take it, your job encompasses determining whether or not that test has validity with respect to the particular job you are concerned with? A. That is correct.

Q. Back in 1956 to 1958, when you narrowed it down to these [132] three tests you have just identified, what did you do at that point in terms of then determining whether those three standard tests had any validity for the instrument man job? A. We asked incumbent instrument men to take the tests on an experimental basis. There were not a great number of them at the time who were available to do this and upon whom we could get some indication of his ability to perform all the tasks that were required on the job, and as a result of that we produced what we referred to at the time as the tentative instrument man's test battery, and we developed this three-tier test recommendation, if you will, or test evaluation because we didn't think that on the basis of the size of the sample we had that we were able to split it any finer than that. Subsequently a revalidation of the test was made with more precise results and with more experience on larger numbers.

Q. So after your initial tentative test battery was selected and validated back in '58, you then used this three-test battery for several years? A. Yes.

Q. And that was utilized from 1958 to approximately what? A. I think the revalidation was done during the period '69-70 or something like that. You must realize I was not in the group at that time.

[133] Q. Mr. Roskind was involved with that? A. Yes.

Q. Now, am I also correct, jumping ahead for a moment, that the test battery that was involved in the instant case used only two of those three tests you have just described? A. From previous testimony, yes. I have no direct knowledge of that point.

Q. Let's back up for a moment, if we might. I would like to go a little bit into the two tests that you have talked about, the EPSAT test and the Minnesota Paper Form Board test, if you will. How did that test ever get a name like that? A. Well, in the earliest development of this kind of thing, the test is designed to and does measure that factor of intellectual capability called visualization. In the earliest days of attempts to measure this factor there was

actually a board, a piece of wood which had shapes cut out of it and the shapes were different complexity and size, and the person who took the test had a stack of shapes and was to place the shapes properly in the holes in the board. I don't recall the year. But this type of a test is cumbersome to administer. It has to be done on an individual basis, and Dr. Rensis Likert and Dr. William Quasha attempted to determine whether or no they could measure the same kind of a factor using paper-and-pencil tests which might then be [134] administered to groups of people rather than individuals, and they were successful in that effort. The correlation between the paper form of the test and the board form of the test were very high, and the paper form of the test was more reliable than the board form of the test, so the paper form board then replaced in the psychologist's bag of tricks the board form.

Q. I want to go into that particular test with you in some detail in just a minute, but initially I want to ask you a few questions regarding the test itself and whether ethically you are permitted to disclose that test to people, and if you as an independent psychologist were asked to analyze that test and determine its validity whether you, for example, would need to actually have that test in your hands.

Breaking those inquiries down into questions, first of all, is it necessary for you, in order to give a professional opinion as to the validity and predictability of that test, to actually have a copy of the test? A. No.

Q. Why not? A. If there is an adequate manual for the test, the manual itself, which displays the research, the nature of the research effort and the data, is sufficient. In fact, it would be very difficult on the basis of looking at a test to [135] make any reasonable judgments about what it measured, whether it measured it well or not. It might be very misleading.

Q. Are there such manuals available for each of these two tests, the form board test and the EPSAT test? A. Yes. They are available from the publisher of the test and there is also a considerable amount of research evidence extant in the literature about the test itself and how it has been used, validity studies, reliability studies, et cetera, et cetera. I think that the number of researches on that particular test, the form board, approaches numbers in the hundreds.

Q. This test then was developed, I assume, many years ago? A. Yes. I don't know the date but I assume it is 20 years old or better. It was around when I was a student.

Q. Now, if one then has these manuals and this research and the appropriate knowledge, he can then set about determining the validity of that test with respect to a particular job situation, having never seen the test itself? A. Yes. He can determine how valid the test has appeared in those researches where it has been used. You can't tell about its validity for a particular job until you have done the research on that job.

Q. Now, in addition to the information that you have talked about, the manuals and the research, is it also permissible [136] or possible to distribute samples indicating the forms or type of questions that are involved on psychological tests such as the form board test? A. Yes, it is. It is unethical to distribute copies of the test. That is clearly stated in the ethical standard for psychologists. You just don't. In fact, in courses where you are teaching students about testing, it is not even ethical in that situation to use the exact forms of the tests which are used in practice.

But there have been several different tests, if you will, which are used for the purpose of training which contain the same kinds of items as exist in the actual test itself, and these are used in training psychologists, business administration majors and others as to what is the content

of these tests, what form do they take, what kinds of questions are asked, what sort of problems are set before the person who is taking the test. There are those kind of things available. There is one particularly that I have used myself—I think copies are in the company someplace—called the multi-aptitude test. It is really not a test in the sense that you use it for assessment or measurement. It is used to train people to appreciate what is involved in those kinds of tests.

Q. That type of information, that particular reference would [137] be available to the general public? A. Yes, it is.

Q. And the manuals would also? A. The manuals for the test can be purchased, and of course the research is in the public domain, in the libraries.

Q. Looking first of all at this Minnesota Paper Form Board test, a few specifics: How long is the test in terms of time allowed to take it and number of responses that are sought? A. I think it is 25 minutes. The actual timing now escapes me. You realize I've been out of that specific business since '69 or '70, so that the time escapes me, but I think it's around 20, 25 minutes.

Q. Is that whole test basically one section or are there different sections within the test? A. It is one basic section, one general type of item, if you will, all set before the test taker, the same general kind of a problem, but it increases in complexity as one goes from the first item on the test to the last.

Q. What is that test used for? I take it this same test is used all through the country in various situations, this form board test. What is it supposed to predict or what do you use them for? A. It is designed to predict the ability to visualize in [138] three-dimensional space, both static and dynamic, what is called space perception. It is one of the factors that we have determined or one component of

the intellect, as one researcher likes to call it, as one of the key abilities involved in work where you are working with mechanical or conceptual systems which interrelate to one another either in space or in time, so that the instrument job, the operating job in the power plants, the lineman's job in the company, sheet metal workers, architects, design engineers, automotive mechanics—various researchers have shown that this kind of a test, the ability to visualize in three dimensions without actually taking the parts in your hands—what I mean by visualization—is a key item.

Q. Does this test attempt to measure those types of abilities largely independent of academic intelligence? A. Yes.

Q. Or experience? A. Yes.

Q. In other words, if we were to give that test to a graduate engineer and a musician, each of whom were trying to determine whether or not they could become good instrument men, it would be a valid type test for those two diverse interests or groups? A. Yes. You might in fact observe a musician who scored higher [139] on the test than did the engineer.

Q. If you perhaps would go to the board, I would like you to put on the board just a brief example of the type of question that you find on this form board test. You said they are all basically the same. What is the test applicant asked to do.? A. (At the blackboard) The basic problem that the applicant has is he's given a form. I'm not much of an artist, as you will see. This is supposed to fit into this one and make a square, gentlemen.

He is then given a set of pictures, I believe five in number, and he as asked the question: Pick out of these five that picture which shows how these parts would look when fitted together.

The problem requires visualizing how these parts might fit together. Sometimes the parts have to be rotated, turned over, turned over in both aspects of the plane in order to decide which one is the right answer. And they

proceed from such simple questions as that to some that are quite complex with many more than two parts.

Q. Let's assume that someone takes that test and he is able to solve a great number of problems so that he scores well on the test. How on earth do you then go about determining whether or not his success on that test had anything to do [140] with whether or not he has the ability to make a good instrument man? A. Well, I guess the answer to that lies in my earlier response to the question about how you validate a test.

You look first at the demands that the job makes on the individual. What sorts of things are involved in the work that he does? And if indeed, as in the case of the sheet metal man, he is actually involved in creating forms, bending metal to produce a particular form, one could make a reasonable judgment that that kind of ability is measured.

Similarly, in the instrument man's area, he in fact in troubleshooting control systems must in fact visualize in his mind, if you will, the interrelationship of various parts of that system and/or various signals that are going about in that system from place to place, these signals being pneumatic signals, hydraulic signals, electronic signals and all that sort of thing, none of which he can actually capture with his hands but he visualizes what is happening, if you will, in the system, and this ability to visualize is measured by this kind of a test.

Q. I believe you told us earlier this particular test is a little unusual in that it has so many validation studies. Am I correct this test has been used by many companies and [141] many different employment situations through the years? A. Many companies, many universities, military organizations, many, many, many different kinds of situations.

Q. This is not a test that the Edison Company designed or it is not peculiar to our company then? A. It is not. It is commercially available. We did not design it. I wish I had.

Q. What about the reliability of this test? Is that significant? A. It is very high. It runs in the .89 to .95 level.

Q. That means what? If you have high reliability, that means what? A. That it measures consistently from one taking of the test to a second taking of the test on a subsequent occasion.

MR. LEWIS: Did you mention some figures a moment ago, .85 or .90?

THE WITNESS: Yes. I said in the neighborhood of .89——

MR. LEWIS: What does that mean to me, .80 or .90?

THE WITNESS: I can go into this if you wish.

MR. HOUGHTON: Can you show him on the board conveniently what that means?

MR. LEWIS: Can you tell me?

THE WITNESS: I can better show you on the [142] board instead of waving my hand.

If we draw a graph and we say that this axis of the graph represents performance on the test taken the first time, if you will, and there are various scores that you can achieve from low to high or few correct, many correct. This is the first time you take the test.

We will put on this axis the second time you take the test, and again we have low, high, and all the scores in between.

Now, if the reliability of the test were perfect—in other words, the same identical score you got on the first test, you would get on the second—for those people who got low scores you would have a score here, and they would

fall on a direct straight line from the lower left corner to the upper right, a one to one relationship between the two tests.

Unfortunately, in psychological measurement we don't find that kind of situation. We don't find direct one-to-one kinds of things. So they tend to be, in the case of this test, a few items which lie—a few instances where an individual took the test the first time and second time which do not lie on the line. They lie rather in an envelope like so.

Now, that envelope—when we are directly on the line, you would have a number that is called 1.00 or a correlation of 1.00.

[143] As the points begin to move away from the line, this then goes in the direction of zero, and what would be shown in that case is that these plots would be all over the place. They would not have any pattern to them; randomness.

In the case of this test, they tend to lie very close to the line in terms of—I don't know the exact numbers, but I'm sure that it is closer to .90 than it is to .80, so that we are talking about something that is a very close envelope, that the test is highly reliable.

Q. (By Mr. Houghton) Taking a reliability of, say, .85 to .92, how does that compare with the reliability of other types of aptitude tests used in the psychological testing field? Is that high or low with respect to other tests? A. Some tests are used which have reliabilities of the order of .70 or .75. They simply haven't figured out how to make them more reliable than that yet.

It is desirable to have as high reliability of measurement as you can get, because without reliability it is difficult to achieve validity. The real problem is validity.

Q. And this test does in fact have high reliability?

A. It is generally accepted among professionals in this field as having among the highest reliability of tests of this type that exist.

[144] (Short recess)

Q. (By Mr. Houghton) Mr. Kanous, we had finished our discussion of the Minnesota Paper Form Board test, and I would like to turn now to the——

THE ARBITRATOR: One question. He was discussing reliability, was he not?

MR. HOUGHTON: Yes.

THE ARBITRATOR: What about the validity of this? What is the correlation coefficient there?

THE WITNESS: It is about, to the best of my recollection, the order of .70, .71, .72. I'm not sure.

Q. (By Mr. Houghton) What does that mean? How does that compare to the validity of other tests? A. That's very high. It is sufficiently high to have caused us working with it to wonder whether or not some mathematical error in computation had not been made, because in industrial practice one doesn't ordinarily see correlation coefficience, validity coefficience at that high a level.

The data was reanalyzed to make sure there were no arithmetic errors. That's the total battery, incidentally.

Q. The total battery validity is .72? A. Yes.

Q. The second test you used in the battery, this Engineering and Physical Science Aptitude Test, which I will refer to as [145] EPSAT, what is that test and how is it set up in terms of divisions or parts? A. The test was originally designed for predicting success in various disciplines which have to do with the engineering and physical science area. An instrument man is one job that falls into that kind of a category. It is a test which is made up of a

number of different parts. There are parts which have to do with mathematics, arithmetic, if you will, arithmetic reasoning, mechanical comprehension, formulation, physical science vocabulary, physical science comprehension.

Each of these parts tests a specific area of interest that is related and has been shown by research to be related to successful accomplishment in those areas I referred to earlier.

Q. And again here we are measuring abilities as opposed to skills? A. Yes, although this particular test has some parts in which the part measures ability by way of assessing current level of skill, physical science comprehension being one of those.

Q. Let's look at each of these six areas that the test is divided into and tell us, if you will, generally how those parts relate to the instrument man job, for example.

The first part we will take is the mathematics section of the test. What is attempted to be measured in [146] that section? A. His aptitude for and facility with mathematics as we commonly know it: addition, subtraction, multiplication, division, fractions, ratios and proportions, a little bit of algebra and a little bit of geometry.

Q. The second area is formulation. What does that mean and what are you attempting to measure there? A. This test is designed to attempt to determine the facility with which a person can take what used to be called in the schools word problems and express them in a formula which best expresses a word problem that he sees.

Q. Looking at these two, I would like just for a moment to return to that math section so we are clear on that. For this job, as indicated in the exhibit earlier, there is a requirement that you have satisfactory credits for two years of high school math. Is a person who has successfully completed two years of high school math and under-

stands those types of basic mathematical principles equipped to satisfactorily handle the mathematics section of this test? A. Not necessarily.

Q. And why not? A. Well, the test actually takes a look at a steeper cut than [147] one would expect to have seen in a typical high school course. We are really after the guy's facility with mathematics at a higher level or understanding of mathematics at a higher level than is typical of a high school course.

Secondly, the statement in the posting does not talk about the type of math nor the high school from which it was obtained. Many of us know today and in the past that the course called high school math maybe required different performances in different high schools, or the same high school may have several courses all called high school math which have different requirements, one for the college-bound student, another for another kind of student and one—I hesitate to say, but is just designed to get the kid a credit in math.

Q. Aside from whatever so-called credit he may have, you measure his understanding of math through this section of the test? A. Yes. That's more reliable than what you can observe on a high school transcript.

Q. You were starting to get into formulation. How are those problems set up for the test applicant to solve? A. I'm trying to recall the items. I think Mr. Roskind might speak more specifically of that, but it seems to me if my memory serves that they are set up in such a way that a word [148] problem is given and then there are either four or five formulas, one of which accurately represents that word problem, and the task is for the person taking the test to properly identify which one of those "formulas" does fairly represent that.

These are not formulas that one might find in physics or chemistry or something like that. You might even call them quasi-formulas.

Q. In the next section, the physical science comprehension section, what types of problems do we find and what are we measuring? A. We are measuring understanding of physical principles. For example, one might be shown two cylinders, one of which is black and one of which is not colored, and the question might ask: When exposed to the sun for a period of time, which cylinder, A or B, will be hotter. And the physical science concepts of reflectivity, of retention of heat, et cetera, must be applied in order to solve that problem. Each one relates to a different physical science principle and its application in a specific case.

Q. This would also include the displacement type problems where objects are placed in water and so forth? A. Yes. I think there is a specific problem on the test which deals with placing a solid geometric figure into a liquid or [149] two of those and asking which one of those will displace more of the fluid. That has almost a direct tie to the instrument man's job in which he does work with the devices which operate on the buoyancy displacement principle.

Q. In speaking of this direct tie, I suppose there are certain questions and answers that the layman might be able to identify and say in his own mind, "Gee, I see a relationship between the answer to that question and the job," and I suppose there are other types of questions where that is not at all evident. A. Yes.

Q. How do you distinguish between those two types? In other words, if a particular question has that type of relationship on its face, is there a term you apply to that? A. Yes. That is referred to as face validity. A test which looks to the uninitiated as though it measures what its title says is said to have face validity. It looks like it measures what it's supposed to measure. But face validity is not a requirement of predictive validity.

Q. When a test has face validity, does that necessarily mean it is more or less valid than one that doesn't? A. Absolutely not.

Q. What is the value of face validity? A. In general it makes people who look at the test happier if [150] they see face validity. They feel better about it. That is about the extent of it.

Sometimes if you develop a test, in the interest of keeping the person who takes it motivated to pursue the test, you might at the early stages, the first few items, introduce face-valid items. That has been done in various kinds of test constructions, put face-valid items in first and the person is then more willing to go on and finish the test.

Q. So am I correct then that whether a particular item or series of items have face validity or not does not measure in any way the validity of the test itself? A. That is correct.

Q. And for a layman to look at a test then that would ask whether a man would rather plough a field or build a barn, if he might not understand what was attempting to be measured there, that is inconsequential in terms of whether the test has validity or not? A. That is correct. In fact, you may for certain kinds of purposes in testing present items in such a way that they do not have face validity. There is a test like the Minnesota Paper Form Board which tests visualization. It uses forms which look like pipes, valves and that is to combine parts together [151] to produce a given shape. But since it looks like pipes and valves, you dare not give that to a pipefitter, a plumber or anybody of that sort because his experience with what valves really ought to look like leads him astray into making inadvertent errors, so that you have to be very careful about when face validity is allowed in the test. It may do the person who is taking the test if he has experience in the area a serious disservice.

Q. We discussed the mathematics, formulation, and physical science comprehension section. The next one is the arithmetic reasoning. What do we attempt to measure there and how is that different than the mathematics section? A.

This is a measure of ability to reason in a deductive way, and there are in general two ways that this can be tested.

One is by presenting questions or problems which are stated in such a way that the symbols used are numerical, so it is called arithmetic reasoning.

It is also possible to get the same measure of reasoning using verbal items. That is referred to as verbal reasoning. What you are really after, however, is not the ability to manipulate the mathematics, but the ability to reason especially in a deductive sense.

Q. How is the ability to reason in a deductive sense important to the instrument man? [152] A. My observation of the job is that that is one of the key issues in the job, to be able to look at a set of symptoms, properly perceiving those symptoms to deduce what is causing this instrument or this system to perform in the way it is, and sometimes the parameters, if you will, the measurements, are many, combining in very complicated ways. So the deduction is not simple nor easy.

Q. The next section is verbal comprehension. What is measured there and why? A. The verbal comprehension test measures essentially again in a physical science context the ability to use language effectively.

Q. And the types of questions that would be asked in that section are along what line? A. I'm afraid I'd have to refresh my memory on exactly what the test items look like in that portion of the test. I'm not certain if they are vocabulary types of items using physical science vocabulary.

Q. And the last section, mechanical comprehension? A. This is very similar to physical science comprehension, only here we are concerned about the ability to apply mechanical principles of levers, principles of gears, principles of centers of gravity, those kinds of things which tend to be mechanical kinds of things.

[153] Q. How is that ability relevant to the instrument man job? A. Many tasks that the instrument man has to perform, especially when he starts getting into the insides

of instruments, have to do with leverages, with springs and gears, with complex linkages, all designed to convert a signal from the form you find it into some useful form later, and that has been for many years the bread and butter of instrument work.

Q. These six sections then comprise the total test? A. That is correct.

Q. And how is this test scored? A. As a whole only. A total score is derived over all the parts. The parts are not scored or not interpreted separately as individual parts. The manual and the recommendation of the authors and other researchers indicate that the individual parts are not of sufficient length to be reliable to use predictively all by themselves. It is the combination and the complexity of the entire set that is used.

Q. I take it then each one of these sections isn't a two-hour examination or anything like that? A. No. The whole test is perhaps an hour. Again I must indicate that I cannot give you specific time or scoring formulas for these tests. You realize that over the years I worked with [154] a very great number of them, and if those data are specifically required, I can get them.

Q. No, I understand that. If some question does come up as to exactly how long it is and so forth, you can get that information for us? A. Yes, that can be obtained.

Q. Now, what about this particular test? Does it have a high or low test validity? A. In this particular instance it has a quite high validity, contributes substantially to the predictive effectiveness of the test battery, and it also is not a new test; it's been around for a number of years, I think going back prior to World War II and during World War II and has been used in many different contexts, predicting success in technical education, predicting success in technical training situations, predicting success in doing work wherein that technical training has occurred; also predicting success in those areas where men are successfully performing the work wherein they learned the job on

the job, but all of the work having to do with this business of it being embedded in the physical sciences.

Q. We have talked about the concept of validity and high and low validity. You may have stated this already but I want to make sure we understand. Can you give us a definition of [155] "validity"? A. I can do that if I may use the board.

Q. Certainly. A. (At the blackboard) The validity is the degree to which a test predicts what it is supposed to predict. If we take this same graph that I have drawn here, and instead of putting the first test over here, if we now put some measure of success on a job on that side of the test, this is success and this is the test score, and you make a comparison between test scores and performance on the job.

You again get individuals, one who perhaps is not successful on the job and his test score is low. We put a mark here.

Again, if it was a perfect relationship between the test and performance, we would see people falling right on the line going on up. That would be perfect positive predictive validity. Again, we don't typically observe that. We typically in industrial practice observe the scores scattering about the line in some fashion, and in the instance of this test battery, where formerly we were talking about reliabilities in the order of .80 and .90 of each test, we are here talking about validity of about .71, .72 positive.

Q. Now, in terms of reliability that we discussed earlier, [156] what is the reliability of the EPSAT test? Is that high or low? A. That's high, ranges someplace, I would suspect, between .75 and .85 or some numbers of that sort.

Q. These two tests then, do I understand, comprise the total battery of tests that are now used for the instrument man job? A. Yes, they do.

Q. Prior to this change that we will get into a little later in the testimony, you used these two tests and in addition

the Wonderlic Test? A. Yes, the Wonderlic Test.

Q. Now, while you are at the board, in response to a question Professor Jones had earlier you indicated the validity of the battery was approximately .72. A. Yes.

Q. What does that mean? Can you explain that to us? Does that mean 72 people out of a hundred are going to succeed on the job or what? A. No. I'm trying to figure out how best to put this.

Q. If some other figure is easier to work with, you may use it. I am just interested in the concept of what we mean by validity. A. The validity of the test tells you how accurately you can [157] predict the performance of a group of people knowing what their test scores are, and if I have a test where the validity coefficient is 1.00, then if I know the test score, I can perfectly accurately predict whatever it was I was trying to predict, and as I back down toward zero, my predictions become less and less accurate. The probability that I will successfully predict diminishes.

Q. The .71 then in —?—? of validity for this type of test is quite high, you said? A. It is indeed.

Q. Very high? A. Very high.

Q. Within the industrial psychological testing field, so to speak, what range of validities do we find for these types of tests? A. Useful validity from .30 to .60, very rarely one of the order of .70.

Q. When you say .30 to .60—— A. That would be .3 to .6. You very commonly find validities of .2 and that sort of thing. Those are really not useful. That means that you would not do much better than chance.

Q. I guess what I am getting at, so we understand this term, I suppose a layman might think if you said you had a .5 validity that this would be a flip-of-the-coin, random-type [158] 50 percent of the time right and 50 percent of the time wrong, and you are not telling us that. A. No, I'm not. That would be the condition which would exist if you had a validity coefficient of 0.00. That is chance. That is the coin-flipping situation.

Q. Thank you. Now, you told us that in the 1950s you became involved in a study of the instrument man job and the instrument man battery of tests and developing that battery of tests. What knowledge did you actually have or acquire with respect to the instrument man job? How did you know anything about the job and what were you looking at in terms of that job either as a static entity or changes or whatever? A. Well, as a part of the business of trying to learn to understand the jobs in the power plants, the operating jobs, the instrument jobs and the maintenance jobs, I spent, I would say, the best part of four years in the plants around the clock, on the day shift, afternoon, night shift—not all on the same day, of course. This was done on Monday and Tuesday of a week. I would be back in my office on Wednesday of that same week, and then back in the plants on Thursday and Friday, and I spent time with the operators, with instrument men, with maintenance people discussing with them: What are you doing? Why do you do that? What is difficult about this? How does it fit into the whole plant [159] here? All kinds of questions.

I was even on some occasions allowed by some of the fellows that I was working with to do some of these things. I packed valves under the direct supervision of the operator who was helping me out.

On a couple of occasions they asked me to determine whether some link fuses were in fact overheated. I declined that privilege since I didn't know enough about it to know whether I was safe in that situation or not.

I spent time in the instrument shop, spent time with the instrument men in the same vein. They were very cooperative with me, answered all the questions I had, and then I would come back and on the basis of the kind of observations I had made and the stories I had been told, the things that I could see, I made some estimates, some judgments about what sort of abilities do these men use in order to

perform these tasks, all the way from a simple replacement of a Bourdon tube gage on a gage board without doing anything to the gage itself except direct replacement all the way to five-hour work on a three-element drum level controler which in those days I think was one of the most complex pieces of equipment that we were looking at in the Marysville Plant, for example.

Incidentally, this was not only done in one [160] plant; I spent time in Marysville, Trenton Channel, Delray, Conners Creek, and then later on in the St. Clair Plant as that plant came within our purview.

At the point of becoming aware of what the guys do in this job and making contacts with them, with their supervisors, with the technical engineers in power plants and so on, I also became aware that there were some changes in technology that appeared imminent down the road; that we were in fact installing the new plant at St. Clair which was going to be a unit system plant; it was going to have the boiler and turbine controls in one room and the electrical controls someplace else. It began to look as though the trend in this area was not having a static situation. There were technological developments which looked as though down the road things were going to get more demanding for the instrument man.

As we went further down this road we could see that five years hence we were going to have Trenton Channel No. 9 Unit in which there was not only a new concept of operation, in the sense of operators working in a control room where they operate boiler, turbine and generator, plus coal handling system, hopefully; the situation was becoming more complex.

The question we had to ask ourselves was: [161] Does this imply a different kind of an instrument man five

years from now, 10 years from now, 15 years from now than those we have currently in the plant? And if we do, then we should look to a different way of selecting people perhaps and certainly a different way of training people. We may have some new training content that these men are going to have to get around.

It was my observation at the time that with respect to the nature of the work itself, the kinds of demands that the job made on the instrument guy, that in Marysville Plant, which is one of the oldest in the system, there were instrument systems applied to that place that were very complex, made great demands on the talent of the instrument man, and as we then looked at the other plants, St. Clair, River Rouge, Trenton Channel 9, St. Clair 7, Monroe 1, 2, 3 and 4, and even now looking at Enrico Fermi, it appears that what is happening is that in the job of instrument man the trend appears to be that we are giving him more and more instances in which he has to apply the highest level of ability than he used to have to apply in the "simpler" plants.

So you look at the development of the technology in the plants, if we say that this is time down here, back when we were looking at this job in the '50s we [162] were at this point and when we looked at the development of the technology, it was going like so, with a very significant change right there. That's when the company decided to go to electronic control systems rather than electropneumatic or straight pneumatic—that was true, I believe, at Trenton 9 the first time; that the cost and reliability trade-offs between pneumatic instrumentation and control equipment had now reached the point where it was economical to go electronic. That's Trenton Channel. Since then we've had St. Clair, Monroe and so on, and we are currently in the process of developing other plants.

If we looked at the job itself and the tasks that the men were performing at this time, we find that some of those job tasks, for example such things as three-element drum level control, that exists up here, and instrument men were indeed required to troubleshoot and maintain that kind of instrumentation.

There were, however, in those old plants fewer occurrences of tasks at that level of complexity. In the newer plants these occur more often and I would say significantly more often.

Q. You would rate them at the same level in the new plants, only with more frequent occurrences? [163] A. That is correct.

Q. What did all of that mean in terms of the selection process that you were attempting to work out? A. Another point, I think, needs to be made, and that is that every plant has relatively few instrument men. There are not very many of them in a plant or not very many of them in The Detroit Edison Company. That's one of the problems in validating tests with this kind of a job. And yet the job is a key one in the plant. It's extremely important to the plant's operation, both in staying in operation and operating efficiently when it is in operation.

So it looked to us that the old methods by which people were selected to move into that job really needed a more careful scrutiny. This was a key position, lots riding on it, and therefore anything that we could do to find a valid way of predicting subsequent success in that job would be very helpful.

I ran into a second thing which is perhaps not relevant to this procedure, but at the time of talking to these guys out there in the plants I found a number of them at about age 35 who would ask me the question, "Do you think I'm in the right kind of work? You're a psychologist. Do you think I'm in the right kind of work?" And it seemed to

me that if we could find some way to better predict [164] whether a man with these kinds of characteristics was indeed going into the right kind of work, we could obviate that kind of concern at a time in his life when he really ought not to be having to make those kinds of decisions. You ought not to have to be concerned at age 35 as to whether or not you have started off on the right kind of a career, especially when it is this kind of a career.

Q. Through this analysis in attempting to determine who will be successful or unsuccessful in the instrument man job, are you saying in effect then that you are seeking to find more people who can perform reliably and consistently at this higher level than you have had in the past? A. Greater numbers of them, yes. But in terms of the level of ability, that's not different. We are looking for greater numbers of people who can pull that off, but I don't think that we are looking for—some of the men who were performing that job back in Marysville Plant in the '50s would and do perform a very acceptable job in a plant like Monroe. They have that kind of talent. They have capitalized on that talent, taken advantage of opportunities to learn and are good instrument men.

Q. And I assume there are others that cannot? A. Yes. There are individuals who cannot perform the whole job satisfactorily. There are some parts of the job which [165] they may be able to perform, but performing the whole thing is not within their range of ability.

Q. And in determining abilities in this context in this case today, am I correct you are seeking to measure and find people that can perform the total job then? A. That's correct. If I may, in years past, the organization of the task of installing and maintaining instrumentation in a power plant was quite different than it is today.

In the past, for example, in the technical engineers group, we had a group of people who were called junior engineers and in training and that sort of thing in the plant. These were graduate engineers, many of them who

had specific training in instrumentation and control systems. We also had, as I mentioned earlier, fewer instances of these high-complexity kinds of situations. The way the job got done, as I observed it, was often that assignments were given to those men who could handle the job, differential assignments, although all the men were rated essentially at the same level. They are all instrument men. But certain instrument men would be given certain kinds of jobs. Other instrument men would get different kinds of jobs, less demanding kind of job, if you will.

Sometime during the latter '50s, after some studies done by the professional employment area, it was [166] indicated that the junior engineer position in such numbers was not really a desirable thing, that there wasn't a sufficient amount of challenge, that the men didn't develop fast enough, so that staff was reduced in size, which meant essentially that the burden of doing these kinds of things independently without calling on some guy for help of one sort or another, whether he be tech engineer or junior engineer, became more necessary for all instrument men.

Furthermore, it was the concept of the plants at that time that the man they had in mind when they said fully-qualified instrument man was a man who in the middle of the night could be called in because some control system was not functional, and then within the range of the test equipment he has available to him and the parts he has to replace it and the accessibility of those parts, to actually keep that system on the line or put it back essentially without assistance. A phone call, perhaps, but certainly not bringing in two men, one of them an engineer, and the other the instrument man.

Q. You worked with this program then through the development of the initial test battery that was utilized up until the changes that you have discussed? A. Yes.

Q. And you then went out of that position when? [167] A. About 1970. I didn't go out all of a sudden. I went on part-time assignment to a project group which then began to take my full time, and then finally I was given the position I currently have in which I am not involved in that any longer except by way of assisting departments to develop training programs for instrument people, and I had some input to the training programs currently used for these people in the Production Department.

Q. And in carrying on your work in 1970 up to date and in terms of revalidating these tests for the instrument men and so forth, Mr. Roskind has had his hand in that work? A. That is Mr. Roskind's responsibility, that is correct. I have not been responsible for that.

MR. HOUGHTON: That's all I have.

THE ARBITRATOR: Gentlemen, given the hour, I think we had better call it a day.

MR. LEWIS: Except I will take about three minutes to ask you to give serious consideration to my request to order those tests or subpoena them, if you will, because based on what Mr. Kanous just said, I'm more positive than ever that I need them now.

I haven't any idea how we could ever tell these six men why they didn't get a score or why they are "head and shoulders" below others who were accepted, the things he told us [168] here today.

MR. HOUGHTON: I would disagree with that completely.

Aside from that also, there is more testimony to come. Mr. Roskind will have some further development of tests. Some of the questions you still may have in your mind I think may hopefully be resolved after you hear him and after you have had a chance to cross examine both of these people.

MR. LEWIS: Let's just review. He said there was a section on verbal comprehension and vocabulary. I don't know what in the world that has to do with an instrument man's job. He said something about arithmetic reasoning, quite apart from mathematics, which was another section, and there was a word problem section. I'm sure we have to have those tests.

THE ARBITRATOR: Mr. Houghton, during the course of Mr. Kanous' testimony there was some indication that there are available sample tests that are not the exact test. I guess the question this brings up in my mind is would one of these kinds of tests meet the problem that we have before us?

MR. HOUGHTON: It might. I have one of them here. Before we break, let me introduce that and give a copy to Mr. Lewis. Portions of that sample test are found in these and others are not, and perhaps I will have Mr. Kanous identify which portions are relevant to this battery so that we know that before [169] we break up. Then you can have that overnight.

MR. LEIWS: If it helps, try it.

THE ARBITRATOR: That might be the answer to the problem here. If it is, that would be one way of resolving it.

MR. LEWIS: We haven't gotten into the scoring or anything like that.

THE ARBITRATOR: No, that is correct, but it would give you some indication, I assume, of the kinds of questions which are asked on the test.

(Company Exhibit 5 marked for identification)

MR. HOUGHTON: We will offer as Company Exhibit 5 a document entitled "The Multi-Aptitude Test, Form A."

MR. LEWIS: No objection.

Q. (By Mr. Houghton) Mr. Kanous, on Company Exhibit 5 which has been admitted, on the front page we see 10 parts in this sample. Will you identify for us which of those parts would be relevant to the instrument man test battery.

MR. LEWIS: Pardon me. You mean which were used in the particular case we have here?

MR. HOUGHTON: Which types of questions or types of ability sections were used.

Q. (By Mr. Houghton) For example, number 10 is the paper form [170] board test. A. Let me refresh my memory. Yes, test number 10 on page 23 does show the kinds of items which are used in the Minnesota Paper Form Board Test.

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[171] Q. (By Mr. Houghton) Those are the types of questions, am I correct, that are used on the paper form board test? A. Yes.

Q. And they are asked to solve problem situations like those? A. Yes.

MR. LEWIS: Was it used in this particular case?

THE WITNESS: Yes. The paper form board test is one of the instrument man test battery.

MR. LEWIS: Okay. What else?

Q. (By Mr. Houghton) Looking at the other nine sections, which, if any, of those nine sections are reflected in the EPSAT test? A. Excuse me, Mr. Houghton, If I may pursue something that I don't want——

Q. In other words, question one, showing those precise forms; we are not saying that that was on the test.

MR. LEWIS: Oh, no. That's the type. I understand that.

[172] THE WITNESS: I wanted to make sure we didn't misunderstand.

MR. LEWIS: Oh, no. I understand. It's symbolic. That's the type.

THE WITNESS: This particular test was not used. Items of this type were used.

MR. LEWIS: It's symbolic of what was used.

THE WITNESS: Yes.

MR. LEWIS: Okay.

Q. (By Mr. Houghton) Starting with item number 1, vocabulary. A. Those are the types of items that are used in the EPSAT test. However, in the EPSAT, the terminology that is used are physical science terminology. The terms are those drawn from physical science. The form of the test item is the same.

MR. LEWIS: The words are different?

THE WITNESS: Yes.

MR. LEWIS: But the form is the same?

THE WITNESS: Yes.

Q. (By Mr. Houghton) The second section is general information. Is there a general information section on the EPSAT test? A. No.

MR. LEWIS: Not used.

BY MR. HOUGHTON:

[173] Q. Item 3, arithmetic. A. Yes, items of this form are used.

Q. Number 4, number series. A. No.

Q. Number 5, figure classification. A. No.

Q. Number 6, mechanical comprehension. A. Yes.

Q. Number 7, word recognition. A. No.

Q. Number 8, scrambled letters. A. No.

Q. And number 9, checking. A. No.

Q. So in summary then, we have examples of the types of questions and responses that are sought on the paper form board test in section 10? A. Yes.

Q. With respect to the EPSAT test, we have examples of the types of questions under the vocabulary portion, the arithmetic portion and the mechanical comprehension portion; is that correct? A. Yes.

MR. LEWIS: Three out of six?

[174] THE WITNESS: Yes.

Mr. LEWIS: Just three of the tests making the battery out of six.

MR. HOUGHTON: Three of the six sections of the EPSAT test.

THE WITNESS: Yes.

MR. LEWIS: There are three that are not illustrated here?

THE WITNESS: That is correct.

MR. HOUGHTON: Whether or not we can obtain examples of the other three sections is something I will inquire about. We may be able to get something along that line also.

THE ARBITRATOR: I would like you to do so, please.

MR. LEWIS: Let me review it, please.

The Minnesota Paper Form Board Test is illustrated here.

THE ARBITRATOR: Right.

MR. LEWIS: The mathematics test is illustrated here; is that right?

THE ARBITRATOR: Yes, arithmetic.

MR. LEWIS: Which is it? We've got arithmetic reasoning and mathematics. We've got two tests in the battery of EPSAT. Which one is symbolic here?

[175] THE WITNESS: Math.

MR. LEWIS: Mathematics is shown. The arithmetic reasoning is not shown.

THE WITNESS: That is correct.

MR. LEWIS: Formulation, word problems?

THE WITNESS: It is not shown.

MR. LEWIS: Is not shown. Physical science comprehension?

THE WITNESS: Is not shown.

MR. LEWIS: Arithmetic reasoning is not shown, right?

THE WITNESS: Yes. I think that's what we said.

MR. LEWIS: Verbal comprehension?

THE WITNESS: Yes. That's vocabulary.

MR. LEWIS: That's the same as vocabulary?

THE WITNESS: Yes.

MR. LEWIS: And mechanical comprehension is shown, right?

THE WITNESS: Yes. It is part 6.

MR. LEWIS: That's what you call mechanical comprehension?

THE WITNESS: Yes.

MR. LEWIS: So we have illustrations of the [175a] Minnesota Paper Form Board Test and three of the six sections of the EPSAT Test.

THE WITNESS: Yes.

THE ARBITRATOR: Very well. We will adjourn until 9:30 tomorrow morning.

(Evening adjournment)

Respondent's Exhibit No. 8

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[178] MR. HOUGHTONS I would also propose as Company Exhibit 6 examples of various types of questions that are found on the formulation, physical science comprehension, and arithmetic reasoning sections of the EPSAT Test. I might add that with respect to these questions there is no such sample manual available as we utilized yesterday, so we did take sample questions that are actually used to acquaint the people taking the test with the test before they take it for the formulation and physical science comprehension sections, and we have [179] developed sample questions for the arithmetic reasoning section like those that are found on the test.

MR. LEWIS: Mr. Chairman, all I have here is one question from each of the sections of the test battery in proposed Company Exhibit 6, one question of each. Yesterday I thought we had a reasonably decent sample of the other parts of the battery in Company Exhibit 5, enough for me to get some kind of a judgment on. I can't get any judgment on a single question for the three parts of the test which are relative to Company Exhibit 6.

Let me understand this. Yesterday, in connection with Mr. Kanous' testimony, the company counsel gave us Company Exhibit 5 which had to do with vocabulary, arithmetic and mechanical comprehension, three of six parts of the EPSAT battery. I point out that there were three other parts for which we had no samples at all. Today management brings in one question from each of the other three parts.

On that ground I would reject it as totally incomplete. I mean it does nothing for me. I would have to persist in my request for a subpoena of the test both at this level and at the labor board level if this is all I'm going to get.

MR. HOUGHTON: In answer, that's all there are. You can ask either one of these men, Mr. Roskind or Mr. Kanous, [180] to go to the board and they would be glad to develop 10 or 15 in each area for you, or we can take the time to do that if that is what you want and that will be made available to you.

The record should reflect that we are indicating to Mr. Lewis that any number of questions of the type on the test will be made available from experts by examples on the board if that is what he desires. All that we had available were included on this document without going into the actual test itself.

MR. LEWIS: Mr. Chairman, my problem, as you well know, is 10 men were turned down for a job in the instrument shop at Monroe Plant. Six from outside were accepted. My task within the "head and shoulders" concept of the contract is to find out why the 10 in the plant, which is the first-level bidding, were not accepted as contrasted to six alien people from outside who were taken.

I've got to know how management considered those successful candidates "head and shoulders." I'm not going to be able to do it with just a single question on three of the test sections. I'm not going to be able to do it. If there were 40 questions in each of these sections, what good does it do me to see one of them? We haven't yet at all gotten to the cut-offs and the grading sections and all that sort of thing.

THE ARBITRATOR: Yes, I agree that we haven't gotten that far yet.

[181] I think to try to answer your questions, I agree with you that you do have a problem involved here in determining how this testing procedure works. I guess I have some fear that even if we had the test before us we wouldn't know that.

But beyond that, in response to your direct request, it seems to me there are two methods of trying to get the information here. One is to the Labor Board. The second is the request of the Arbitrator. But I think you have perhaps exaggerated some of the subpoena power of the Arbitrator.

MR. LEWIS: I doubt it.

THE ARBITRATOR: This would be a question, I expect that the Court would have to answer if I made such a request. I think I do have the power under the Speilberg Doctrine to determine whether there has been bargaining in good faith, and of course the company could then appeal that decision to the Board also, or I suppose that the Board, given this particular request that you have before it, under the Collyer decision could defer to the Arbitrator, so that either way there is some possibility here.

But I guess I also have the fear, Mr. Lewis, in reflecting upon this question through heavy traffic last night, that if the test were brought and made a part of this record, the company would lose no matter what the decision.

[182] MR. LEWIS: I don't think so. They don't have to give the same test to the next group.

MR. HOUGHTON: That is, of course, completely incorrect. These tests involve years of research and careful study. You can't monkey with a test and start changing it or you lose all the validity of the test.

MR. LEWIS: If I understand it, looking at Company Exhibit 5, there's all kinds of variable choice or multiple

choice things here. Who said you can't vary multiple choice questions?

THE ARBITRATOR: No, I don't believe so, Mr. Lewis, based upon——

MR. LEWIS: Look at the vocabulary. It's a cross word puzzle; which word is relative to which other word? That's cross word puzzle stuff, in my opinion, if you do that. In other words, there's 15. Why can't you pick 15 other words? I don't understand it.

THE ARBITRATOR: Each question has to be item analyzed ——

MR. LEWIS: Professor?

THE ARBITRATOR: I say each question has to be item analyzed and validated against——

MR. LEWIS: But my question is this: Let's take vocabulary. This is really a cross word puzzle. 15 words [183] relate to 15 other words' meanings.

THE ARBITRATOR: But what I'm saying is that——

MR. LEWIS: Why couldn't they take 15 other words?

THE ARBITRATOR: Not without testing.

MR. LEWIS: What do you mean, without testing?

THE ARBITRATOR: Seeing if they are valid questions.

MR. LEWIS: Valid words?

THE ARBITRATOR: Valid questions, doing what you want them to do. That would be my impression, now, and I'm no expert on this matter and I would like to hear the experts testify to this question.

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[190] THE ARBITRATOR: On the record, please.

In a discussion off the record between the advocates of the parties and the Arbitrator, it was agreed that the company would obtain booklets of an exam which purport to be similar to the types of questions given on the aptitude test for the instrument men. The company will obtain these booklets and give them to the union for examination.

MR. HOUGHTON: I might add that this pertains to three divisions of the EPSAT Test, the three that we have not already supplied.

THE ARBITRATOR: Correct. Let us proceed then.

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[194] Q. (By Mr. Lewis) Mr. Kanous, is everybody in the Edison Company tested these days in trades jobs, for example? A. No.

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[197] Q. Well, I'm trying to understand your testimony, and it was a wide range of the reason for testing. Let me ask a very elementary question. Why do you test people with aptitude tests developed by industrial psychologists? Why do you do it? A. To try to insure that there is a reasonable possibility that the employee will be successful in all aspects of the job both for the benefit of the company and for his own benefit.

Q. And how do you know that you are successful in that endeavor? A. By the validation studies which we conduct on the tests.

Q. I am trying to understand how you can find out later on you were right instead of wrong. You can do that statistically? A. Yes, I think you can.

Q. But you would never know, would you, that you left out a certain fellow who might have been better because you hadn't tried him? Isn't that a safe statement too? A. The use of the term "never know," that is accurate.

But the part of it that says "because you hadn't tried him" is not necessarily accurate.

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[199] Q. Did you testify, sir, that the person either would be acceptable or not recommended as a result of these testing devices? [200] A. In the instrument battery, that is my understanding of the current method of making recommendations to the department, yes.

Q. In other words, it is a pass or fail system? Is that another way of saying it? A. Essentially.

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Q. Let's say you have a specific line which is the demarcation point between pass and fail, and the line is, say, 50, using a figure hypothetically, and one fellow is 49 and the other fellow is 51. Are they "head and shoulders" different? A. If we have established a 50 and that has been agreed upon as the cutting score, I guess I would have to say that that is indeed "head and shoulders difference."

Q. One point on one side of the barometer and one point on the [201] other side of the barometer would constitute "head and shoulders difference"? A. If that were the standard that had been established, I would say that that is the case.

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[202] Let's get back to definitions. A battery is what? A group of sections of tests? A. A battery of tests is a group of tests collected according to some empirical procedure which combines those tests to produce a single score at the end, some combination of the results of the several tests; in the case of instrument man, the Minnesota Paper Form Board and the Engineering and Physical Science Aptitude Test.

Q. My next question: Is there a total score in the entire battery or are there specific scores in each section? [203] A. In the case of the instrument man test battery there is a score for the Minnesota Paper Form Board and there is a score for the Engineering and Physical Science Aptitude Test. These are combined in an empirical way to produce a battery score.

Q. What do you mean, empirical? A. I mean that mathematical statistical procedures are used to define what those scores will be, what those numbers will be.

Q. What kind of mathematics? You mean weights and things? A. Yes.

Q. Ratios and proportions and what kind of mathematics? A. Statistical analysis, correlation coefficients, reliability coefficients.

Q. Who decides the weight to be given to each part of the exam or each facet of it, for example? A. This essentially arises from the empirical or mathematical process by which the study is conducted.

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[213] Q. All right. When you have a battery of tests, and let's say like the EPSAT—that has six parts to it, right? A. That is correct.

Q. Do you ever relate each of the parts as between a successful candidate and an unsuccessful candidate, or do you just take the total score and relate that? Do you want me to make that a little clearer? A. Yes.

Q. For example, let's say Employee A was successful and Employee B was unsuccessful. Do you take the vocabulary of Employee A and compare it with Employee B's? Do you take the mathematics of Employee A and compare it with Employee B? Do you take the arithmetic reasoning and compare that between Employees A and B? Or do you just score up the whole battery and say that Employee A has got so much and in the whole battery Employee B has got so much and decide on that point who wins? A. Are you speaking of the instrument man test battery as it is applied?

Q. Yes. In the EPSAT Test you had six parts, right? [214] A. Yes.

Q. I want to know did you take each of the parts and compare them between Employee A and Employee B, Em-

ployee B, Employee C and Employee D? A. We do not.

Q. You take the total? A. The total of the EPSAT, that is correct.

Q. And if that is theoretically 1 to 100, if it is 80 for Employee A and only 65 for Employee B—well, you have a pass-fail system, don't you? A. Yes.

Q. You have a cut-off point, right? A. Yes.

Q. Let's get my 50 back again then. If you have 60 in Employee A and 49 in Employee B, Employee A wins? A. That battery of tests is composed of more than the EPSAT Test, so we have to include both tests to determine whether the man is going to be above the cutting score or below it.

Q. That will be my next question. Do you then take the paper form board? Is that what you mean? A. The paper form board, that's right.

Q. And you take the results of Employee A and relate them to Employee B as a separate item also? A. No. It's a combination of the two tests rather than each [215] being separate items.

Q. All right. So that theoretically—I'm talking theoretically just as you did now—if one or two parts of EPSAT, for example, were declared to be unreasonable or invalid, you see, then the whole test scoring system would be unfair, would be a distortion, wouldn't it? A. I don't——

Q. Suppose somebody, some judge or arbitrator, said, "Look, we don't think vocabularly is really necessary here." A. He might say that.

Q. All right. Now, you have already scored people based on vocabulary in part, haven't you? A. There were vocabulary items in the test, yes.

Q. All right. So that if somebody ruled vocabulary out, and this successful fellow, Employee A, scored high on vocabulary and B scored very poorly in vocabulary but B scored very well every other way, that would produce a much different result, wouldn't it? A. As far as whoever

made the judgment that said that the vocabularly was not useful, it would make a difference to him, I'm sure.

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[220] Q. Now, did you say you had two sets of batteries for instrument men, an old set and a new set? Were they revised? Did I understand that correctly? A. Yes.

Q. When was the first set? Years ago? A. I believe it was about 1958-59 that the original battery was [221] built and used. It included the three tests we spoke of earlier.

Q. The Wonderlic was in it? A. The Wonderlic was in it, and that was used up to about '69-70, at which time—just prior to that time a revalidation study had been conducted and the new battery consisted of only two tests with a different scoring or recommendation system.

Q. The old test included the Wonderlic, you said? A. That is correct.

Q. The EPSAT? A. The EPSAT.

Q. And the paper board? A. Minnesota Paper Form Board.

Q. The new set only includes the EPSAT and the paper form board? A. Yes.

Q. Not the Wonderlic? A. Not the Wonderlic, as I understand it.

Q. You have excluded the Wonderlic? A. For some reason that I have no knowledge of, it was dropped. It is now no longer included.

Q. I was going to ask you if it is safe to say some men were tested under the old system, including three parts to the battery, and these men in recent years were tested including only two parts to the battery? [222] A. I have no knowledge of that in the case at hand.

Q. What did the Wonderlic test do? A. The Wonderlic test is a generalized test of ability to learn new things, facility with learning new things. That is a layman's description of the test, incidentally.

Q. This is not to say that the new test doesn't envision

that people have the ability to learn? A. No, the new test doesn't envision that. They have either none or some.

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[240] MR. MCILROY: Could I ask one more?

Say, for instance, you did give this test and say I did very well on vocabulary, general information, word recognition, but on mechanical comprehension I did very poorly. You told me I would be graded straight through, right?

THE WITNESS: Yes.

MR. MCILROY: And you would have to use a figure of 100, possibly, right?

THE WITNESS: You will have to pursue it further, Doug. I'm not with you.

MR. MCILROY: Say when you total everything up, I could get 100 if I did every one perfect. I came out with an 80, but my mechanical comprehension was very poor. Would I still pass and be allowed in the instrument shop?

THE WITNESS: Yes. You would get 80. That is the total score on all the parts. Of course, this is a [241] hypothetical example. That's not how the instrument man battery necessarily is——

MR. MCILROY: But you did say you don't take each section and score it; you take the overall test?

THE WITNESS: That is correct.

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[241] WILLIAM L. ROSKIND

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOUGHTON:

Q. Mr. Roskind, your full name and position with the company? A. William Loveman Roskind. I am the Administrator of Psychological Services of The Detroit Edison Company.

Q. And what division or department of the company do you work within? A. This is the Organization Planning and Development Department of the Industrial Relations Department.

Q. And who heads up your division or department? [242] A. Mr. William Dull is the Manager of Organization and Development. Mr. Robert Schwab is the Vice President of Industrial Relations.

Q. What is Dr. Worbois' position? A. Dr. Worbois' position is that of the industrial psychologist in the Organization Planning and Development Department, and I report directly to him.

Q. And who does he report to? A. Mr. Dull.

Q. Within the group that reports to Dr. Worbois, how many are there and what is your total overall function? A. There are currently five employees in the group that report to Dr. Worbois. We have a counseling psychologist and a secretary that report directly to Dr. Worbois; I also do. And there are currently two employees that report to me. One is the personnel examiner who administers the test. The second is a technical clerk.

Q. So these tests when they are given in various locations throughout the company for various jobs are given and administered by someone that reports to you? A. That is correct.

Q. Mr. Roskind, when did you first come to work for Detroit Edison? A. I started with the company in the spring of 1966 as a [243] research associate, an intern position with the company while I was working on my doctorate in Industrial Psychology.

Q. Prior to 1966 what educational training had you received in the field after high school? A. I received a Bachelor's Degree from Wayne University in Psychology, a Master's Degree from the Psychology Department in General Theoretical Psychology, and I had completed almost

all of my course work toward the doctoral degree in Industrial Psychology at Wayne.

Q. At this point you came to work for Detroit Edison? A. That is correct.

Q. In your position as a staff research assistant or whatever the correct title is, what were your job duties? A. To conduct personnel research studies as directed by our director, Dr. Worbois.

Q. At the time you first came to work in the department was Mr. Kanous still working in that area? A. Yes, he was. At that time he was working almost full time in the department in this work group.

Q. Did you have an opportunity to work with him at all on the instrument man B battery? A. Not in its original development. It was developed prior to my coming to work for the company.

Q. What work, if any, did you do with him in connection with [244] the instrument man B job? A. Nothing specifically with him on that job other than discussion of the test battery as one of the many test batteries that had been developed and that I was looking into. We were doing some normative research at that time and that was one of the many test batteries we were considering, but nothing specifically in the area of validation.

Q. So the validation work that was later done then was done by you, not Mr. Kanous? A. By myself and Dr. Worbois.

Q. How long did you hold that initial position, from 1966 until when? A. Until approximately 1970, at which time Mr. Kanous left our group and I moved into a position called the research psychologist.

Q. What are the duties of the research psychologist position? A. Again conducting personnel research work, test development construction, validation studies, some work in human factors and work in terms of counseling with employees who had taken tests, and many other jobs or duties that are wholly unrelated to this instant case.

Q. A couple of those areas I would like you to comment on just briefly. You mentioned you were involved with test [245] construction research. What does that involve? A. Actually the development of new tests.

Q. This is involved then with determining what types of aptitude you want to consider, constructing the questions, the sequence of questions, validating the test, this sort of activity? A. The entire process of test construction as you have described it and of course in great detail.

Q. And the validation work that you were going at this time, is that similar to the validation type studies that Mr. Kanous referred to? A. Yes, it is.

Q. Am I correct then that you have done test construction research and validation studies in areas other than the instrument man job? A. Yes, that's true.

Q. How long did you hold that position, from 1970 until when? A. For a year or maybe a year and a half, at which time as a result of an organizational change I became Administrator of Psychological Services, and that is the position that I hold at this time.

Q. So at the time this grievance arose and at the time you were doing your validation work with respect to the instrument man job you held what job title? [246] A. Well, I think part of the time of the revalidation study I may have been under the duties of the research psychologist, but at the time that the grievance occurred I was the Administrator of Psychological Services.

Q. All right. Mr. Roskind, I would like to direct your attention now to the instrument man battery of tests that we have mentioned in the testimony. Mr. Kanous stated that he developed the initial work up to the point that you came on the scene and that subsequent to his leaving that particular area, the test was refined in certain ways; the Wonderlic portion of the test battery was dropped and the resultant battery was then validated.

Stating initially, if you will, what was your first contact with the instrument man test battery and how did you hap-

pen to be assigned to do work in that area? A. It came to the attention of our group that the technical engineers in the plants wanted to talk to us about the instrument man battery. We scheduled a meeting with the representative group of the technical engineers, about four men. They explained to us that they were experiencing some difficulty and approached us on the subject of possibly setting higher standards for the instrument man battery.

They were concerned with the problem that some of the men that had met the "acceptable" standard on the [247] original instrument man battery were not working out very well on the job. They were not able to do the entire job without a lot of back-up additional assistance in order to do the job well, and of course their immediate concern was being in a position to select instrument men who in fact could do the entire job. So they approached us on the subject of raising the test standards.

We explained to them this is something that can't just arbitrarily be done. You can't just raise the test standards by some increment to accomplish this; that you have to have some empirical basis for adjusting the test standards either up or down, and we told them that we would be glad to look into this situation with consideration to revalidating the entire test battery and seeing whether or not the cutting score was at a point where it should be. So we agreed to undertake a revalidation of the instrument mantest battery at that time.

Q. By "that time" we are speaking of roughly what period? A. Very early '70 or late '69.

Q. And ultimately when the test was revalidated and the new battery was established, that was then utilized in the fall of 1970? A. That is correct. I think the revalidation study was written up by Dr. Worbois in 1970, in August, and I made the decision [248] on September 21, if I recall, 1970, to initiate the new test standard at that time.

Q. Did you actually take part, yourself, in work on the revalidation? A. Yes, I did. I suggested this technique for arriving at the performance evaluation of the current instrument men and I took care of some of the statistical analysis of the data.

Q. Let's do this step by step so we understand how we got to the test battery that was used in this case. When the initial decision was made to revalidate the test battery, what did you do then? Take some time, if you will, and explain your thinking as to what you did and how you developed the validation. A. We decided that we would look at these very same tests that we had been using in the instrument man battery. We had no reason to believe that they were no longer working. We decided to consider those same tests, and we decided to get as hard as possible a measure of job performance as we could obtain, so we suggested to the technical engineers in the plants that they go back to the other engineers and arrive at a series of job tasks that could be evaluated objectively.

We gave them some criteria for developing this set of job tasks. We told them we wanted them to develop a set of tasks that would be representative of the job of [249] instrument man, from some of the most simple tasks to some of the most complex tasks, and we asked them to develop a set of tasks so that they would have several items at each level of difficulty.

Based on their conversations with us, we suggested a method of evaluating an individual on those tasks, and we suggested a procedure that resulted in the evaluation being made on whether an individual would be able to completely do the job, that small task, that part of the job, completely independently on his own in a satisfactory manner or whether he would need some assistance in performing that task, assistance that he might get by asking someone else or making a phone call, or at the poorest level of performance possibly able to accomplish that task but only with

some direct assistance, someone standing right next to him guiding him through the job.

We arrived at 23 tasks representing some five different levels of complexity or difficulty in terms of performance in the job.

Q. Excuse me for just one second. These are all actual tasks that the instrument men perform within their job? A. That is correct. Dr. Worbois and myself did not generate these tasks. We did not think them up. We asked the engineers to select from the actual jobs specific tasks that [250] are representative of that job.

Q. Go ahead, please. A. The engineers came back to us with a set of tasks that they had achieved agreement on as being representative of that job and agreement on in terms of that job and agreement on in terms of the level of complexity of those tasks in the job.

We made up some evaluation sheets for those 23 tasks. We sent the evaluation sheet to the various supervisors of the instrument men and asked them to evaluate each man's performance on the job in terms of those tasks specifically, and we obtained at least two evaluations of each man's work—that is, two independent evaluations from two different supervisors—in an attempt to get reliable estimates of this man's ability to perform these tasks.

Q. Were these independent judgments? A. Yes, they were independent judgments in the sense that each man filled out the evaluation form independent of the other one's knowledge of how he filled it out. With that information then as to these individuals' ability to perform the job we correlated the test performance that we already had on file for these individuals.

Q. Let me just interrupt you for a second and ask you a question. Supposing you had a particular man in certain tasks and you had three supervisors that rated him, and one rated him at [251] the top, one rated him in the middle, and one rated him at the bottom. How would you handle that? A. Well, that would be an unreliable estimate of this man's performance, and that situation did occur in several instances and then this man was removed from the rest of the validation study. We cannot estimate the man's ability to perform the job if we can't get a reliable estimate of his ability to perform the job, so in several cases specific individuals were removed from the study and were no longer considered in the study.

As a point of information, this same scale was used many, many months later for some other individuals and some of these same individuals, and it turns out that the reliability of this performance evaluation is extremely high.

Q. So this particular performance evaluation itself has a higher degree of reliability? A. That is correct.

Q. Then what was the next step? A. The statistical analysis of the data, comparison of the test scores, performance on the test with performance on the job. This statistical analysis led us to this correlation of the .71 of the predictability of the test for the job.

It led us to the conclusion that two of these [252] tests were working quite well in predicting performance on the job. The third test was not making enough contribution to the prediction to justify continuing using that test in the test battery—that's the Wonderlic Test—and at that point we decided to drop that test from the test battery, and then this further analysis which led us to this cut-off point and this, as we have been saying, two-tier evaluation of performance on the test, the "not recommended" and the "acceptable."

Q. Is this a fair statement then? As a result of this research and study, basically two things were done: Number one, the Wonderlic Test was dropped from the test battery; and, number two, a new cut-off point was selected for the remaining two tests which constitute the battery? A. That is correct, yes.

Q. You did not change the actual form board test or the EPSAT Test that you were using? You used the same test, only just those two? A. That is correct.

Q. Is there any way you can graphically demonstrate for us or show us what we mean by this .71 correlation either on the board or verbally so we understand what you are talking about? A. (At the blackboard) I think so. It is going back to a [253] diagram that Mr. Kanous has already used several times, and maybe we can put it in some perspective in terms of several different diagrams.

If we talk about performance on the job, performance on the test on those two axes, if we had had a perfect test, again low performance on the test would have indicated in every case low performance on the job. That is to say we can take any one individual person and we can represent him on this scatter plot and we can get two bits of information from his location on the scatter plot. If the individual is located at this point on the scatter plot, that tells us that in terms of performance on the job he was high. In terms of performance on the job he was high. In terms of performance on the test he was also high.

Now, if we had had a perfect test with perfect prediction—and that never happens—all the individuals would have fallen along this line, and that would be represented by a correlation of 1.00.

We've got to look at two more things. This would be the cutting point on the test and the cutting point on performance on the job. This would be successful performance or high performance. This would be poor performance or unacceptable performance on the job.

If we had had a test that had no predictability [254] at all, a correlation of zero, the scatter plot instead of looking like this would have looked like this would have looked something like this. Again the two cut-off points with high performance on the test and low performance on the test;

low performance on the job and high performance on the job.

We would have had a test where there would have been some people who scored low on the test and performed poorly on the job; other people who scored low on the test but were some of the best men on the job; we would have had some individuals who scored very high on the test and were very poor or unable to do the job in its entirety, and other individuals who scored very high on the test and were some of the best instrument men we've ever had, and every position in between if we had had enough instrument men tested.

So in other words, this scatter plot instead of being a line would be filled in with individuals all over it, and if we were to try and encompass the individuals, we would have almost a circle or the entire chart filled up.

In this case with the zero correlation, these would have been accurate predictions and these would have been accurate predictions, and if you look at the area that is covered by the accurate predictions, it would have been about 50 percent of the whole surface or the whole area that [255] we are talking about over all individuals that we made decisions on. We would have been right half the time and we would have been wrong half the time.

Q. So rather than use a test with a zero degree of predictability, you might as well flip a coin, I guess? A. You might just as well flip a coin.

Now, a test with a correlation of .71 would look something like this. Again the job is on this dimension. The test is on this dimension. This is the cut-off point on the test. This is the cutting point on the job as to whether the performance is acceptable or unacceptable. I don't know whether it's a little bit wider than that or a little bit narrower than that. It is kind of hard to pick .71 and put that on the board.

But what I am saying is this: If you look at the area again where you are making erroneous decisions, it is small relative to the area where you are making the correct decision. These are individuals that should not be on the job. These are individuals who the tests say will do good on the job. The purpose of the test then is to maximize this type of decision and reduce the errors that are made.

A correlation of .71—well, as far as this test is concerned, what we find is this: of the people who are successful in terms of passing the test, these people [256] have 76 chances out of 100 of being successful on the job. Of those individuals who perform poorly on the test, 18 chances out of 100 of being successful on the job. So there is quite a difference. You might even call that a "head and shoulders difference."

Q. How does the .71 correlation compare with other correlations on aptitude tests used in other industrial job situations? A. You very, very seldom find a correlation of a test predicting based on aptitude performance on a job anywhere near as high as .7.

Q. That then would be considered to be a very successful predictor? A. Definitely.

Q. With respect to this study that you have just told us about that you and Dr. Worbois conducted, has anyone else tried to validate this particular battery of tests for the instrument man B job or did anyone else review your work or the company's work? A. Approximately a year later, the National Compliance Company under a contract conducted some revalidation studies of a number of different test batteries for our company. This was one of the test batteries that was included in their study. In their initial attempt——

Q. Before you get into it, can you identify this company and [257] what their business is. We are not familiar with

that. A. The National Compliance Company is an organization that is located in Dallas, Texas. They are doing extensive work these days with utilities on civil rights cases. They basically consist of legal and psychological professional people who offer services to organizations in almost the entire area of compliance with EEOC guidelines and all the federal guidelines on equal employment opportunity.

Q. And within their own personnel they have competent psychologists who can validate tests; is that correct? A. That is correct.

MR. LEWIS: How would he know that, Ralph?

MR. HOUGHTON: I assume he has worked with it. I guess we have to develop it.

THE WITNESS: These individuals who conducted this revalidation study for NCC were industrial psychologists, Phds, members of Division 14 of the American Psychological Association and practicing psychologists.

Q. (By Mr. Houghton) What did they do for Detroit Edison Company, particularly with respect to the instrument man B? A. They conducted a revalidation study which in effect included a slightly larger sample than was in our original sample, changed the job evaluation procedure by reducing the number of items in it, and conducted their own study based on the [258] test performance that we were able to provide them and the performance evaluations that were turned in at that time by the man that the instrument men work for.

Q. I guess you have told us already, number one, you did establish a high degree of reliability between those two samplings? A. Of job evaluation, performance evaluation, yes. There was a very high degree, indicating that this scale that we did develop or this evaluation instrument that we developed is a very reliable evaluation of a man's performance on the job.

Q. Then using the second set of evaluations and fewer actual number of test jobs or criteria jobs, as you may call them, what results did the National Compliance Company come up with? A. They were able to establish the validity of these tests for predicting performance on this job.

Q. And what was the correlation that they determined? A. I would have to look it up in the document to check it out.

Q. Is there a written document that was furnished to the company? A. Yes, there is.

Q. If you would refer to that, please. A. The correlation obtained by the NCC in their study was .41.

[259] THE ARBITRATOR: I lost track with that exchange. Correlation with what now?

THE WITNESS: I'm sorry. Their validity coefficient, .41 in terms of the correlation between performance on the test and performance on the job.

Q. (By Mr. Houghton) That .41 figure corresponds with the .71 figure? A. It is the same type of figure. It is different in magnitude but the same type of figure, and the difference in magnitude probably can be explained in terms of the short form of the evaluation, the job evaluation form that they used.

Q. Perhaps you better take a little time and go to the board and explain that to us. With tests like this where you have a high degree of reliability, a .71 correlation, how would you expect this company to come up with .41? What is the reason for the differences? A. If you want a complete explanation of that, I would like a chance to go through their report in a little bit more detail before I try and answer that question, if I may.

MR. HOUGHTON: Fine. Sure. We will move on to something else for the moment and perhaps you can take a look at that over the lunch break.

(Discussion off the record)

MR. HOUGHTON: The record will reflect that the [260] document referred to by Mr. Roskind was introduced by the government in court. The government removed from that sheath of papers the instrument man validation study and did not desire to have it introduced, and counsel for The Detroit Edison Company ultimately did obtain its introduction into evidence.

Q. (By Mr. Houghton) Mr. Roskind, looking at the test then that is utilized in the instrument man job, you have what you consider to be a test with a high degree of reliability. You utilize it in the testing procedure.

Let's turn particularly to a situation where you are going to give the test and assume a situation where these candidates for this particular job opening were given this battery of tests. How do you go about setting up the testing procedures and insuring fairness and so forth in the application of the test? A. When the employment office contacts the testing group and informs them that they have a group of individuals to be tested, an appointment is set up and the individuals are scheduled for testing.

When the individuals report to the testing office—and I would say that 99 percent of the testing is done in our own office under conditions that we control in terms of lack of interruption and noise and interference that might distract from the testing situation—an individual [261] who has been trained to give the test in a standardized manner introduces the test, talks to the candidates about the test, to some degree explains to them why they are there, what the test battery is about, how long it is going to take, and answers whatever questions about it that would be appropriate.

The tests are then administered in a very carefully controlled standardized manner so that it doesn't matter which day or which group you are in when you take the test.

When the testing session is over with, the candidates are released to go back to work, and the tests are then scored against a scoring key provided by the publisher of the test. The scores are obtained and summed according to our standard procedure, and the evaluation is made then as to whether or not the individual is "acceptable" if they meet the standard or "not recommended" if they don't.

This result is then relayed to the employment interviewer who is responsible for this particular job selection or posting, and I think just recently there was a posting for instrument man at Monroe, and the plant asked if we could do the testing at the plant so as not to have to bring the men all the way downtown. The individual went out and checked the facilities at Monroe first to see if they [262] were appropriate to be used for testing before agreeing to conduct the testing at Monroe.

Q. Now, when you have the group assembled and they prepare to take the test, is there any introduction by the examiner as to how the test should be taken, how answers are marked, sample questions, anything of this sort? A. Yes, there are. The directions are provided to each candidate when he is taking the test, and the personnel examiner goes through the directions and reads them out loud. In most cases there are sample questions. The examiner makes sure that each person has worked through the samples and understands what it is that is expected of them during the test before the test begins.

For example, in the case of form board, the directions take the candidate through four sample problems, and then after the directions are finished the candidate is asked to work four more problems on his own. The personnel examiner then checks to see that the individuals have in fact correctly solved those problems so that when the person is actually taking the test, they know what it is that they are supposed to be doing while they are being tested.

There is no attempt made to test a person in such a manner that they don't understand what it is that is expected of them.

Q. Now, when it gets down to scoring the tests and you use a [263] scoring key, this is strictly objective device whereby someone uses a key to determine the number of correct and incorrect responses? A. That is correct. By an objective device we mean that it doesn't matter who scores the test. We only have one person who does that, the personnel examiner, but it wouldn't make any difference if someone else did it. If they did it according to the instructions, they would arrive at the same answer. It is not something where judgment enters into the scoring of the test.

By the way, the individual that we are talking about who does this work has a Bachelor's Degree in Psychology and is working on a Master's Degree in Psychology which he will probably receive sometime this year.

Q. With respect to the actual scoring of the exam, on that form board test, for example, if I were to blacken in two of the spaces where the directions say only blacken in the one correct one, and I blacken in two in the hopes that one of my two will be correct, how would the scorer handle that? A. There are several keys for the test, one that indicates the number right, another that indicates the number wrong, and by placing both keys on the test, we could pick up even two wrong answers if you had tried and were wrong in both cases. By a scanning of the answer sheet to determine whether two [264] or more items were marked, we would determine that, and this is done.

Q. Then that item would be disregarded? A. That is correct, and that is mentioned in the instructions that the person that is taking the test understands that.

Q. Now, you get all these tests scored and you come up with your composite battery score and you are then placed in the position, I guess, of determining those who have received a "acceptable"rating and those that don't. How do you establish that. And in particular, how did you establish this cut-off point you have referred to? A. At the time that the tests are being scored we have this cut-off point that has been mentioned, and if an individual has a battery score that is equal to or greater than that cut-off score, they are given the evaluation of "acceptable." If their battery score is less than that standard, then the evaluation on that is "not recommended."

Q. Why did your research indicate you should change from a three-tiered system to a two-tiered system?

MR. LEWIS: I thought he explained that already. You mean the Wonderlic?

MR. HOUGHTON: No. That was dropping one of the tests. I'm talking about the scoring.

MR. LEWIS: Oh, the scoring? All right.

[265] THE WITNESS: The reason we dropped to a two-tier system was this is as fine a discrimination as we could make based on the data that we had.

Under an ideal situation you might be in a position to say that a range of scores from this point to this point would result in a probability of such amount of success on the job. An individual who has a slightly higher score in another range of scores has a greater probability, and you might be able to spell out what that probability is and so on through a whole range of tests. In other words, you might be able to grade them A, B, C, D or E or something like that, or a range of 0 to 10, 10 to 20, 20 to 30 and specify the percent or the probability of successful candidates you might expect in each one of those scores.

We do not have enough information in this data to make any finer discrimination than just those two discrimina-

tions that we have made; that is, either "acceptable" or "not recommended." So that is all we could do.

Q. (By Mr. Houghton) In other words, you are saying with the available information it would be rather arbitrary and not necessarily valid or accurate to make any sort of a finer discrimination? A. That is correct, yes.

Q. And this cut-off score is something that is statistically [266] determined prior to the test being given; is that correct? A. Yes. It doesn't change from day to day. It is one standard and it is used for everyone.

Q. That same standard has been used each time this battery has been given for all the men that take it? A. That is correct.

MR. HOUGHTON: I believe that's all I have for the moment.

(Luncheon recess)

THE ARBITRATOR: Have you finished your direct examination?

MR. HOUGHTON: Subject to going back to that one point that we left.

Q. (By Mr. Houghton) Mr. Roskind, to finish up the direct examination, before the break we had made reference to the National Compliance Company's study, and you testified that there was a .41 validity coefficient on that particular study and that the company's validity study showed a .71. Could you explain for us, if you will, the nature of those two studies, whether they differ or not and what the reasons for the difference are. A. Well, the basic studies do differ to an important extent from each other, and perhaps some background information on the National Compilance Company's study would help to understand [267] this difference. At the time that National Compliance came in and did the validation study on the instrument man battery for us, they were at the same time working on ap-

proximately 15 other test batteries and they had a contract to do all 16 batteries in a six-month time period, and they were looking for ways to do it as quickly as possible. It is quite a tremendous job to take on revalidation of 16 test batteries in one organization in that short a time period.

They agreed for practical purposes to use people who had been hired between 1967 and 1970 or '71—I'm not sure which of those two years at the time—because we had their test information on keypunched cards, and that we put on tape, shipped to Dallas to go through their computer. It's a rather large number of bits of information to process.

When they did the study, they discovered that there were only about five individuals who had been hired during that time period, and that is too small a sample to do a validation study on, so they came back to us and asked us for a list of all the instrument men who were currently working on their job, and we obtained their test information by hand from files, the records.

In their original study, the one that turned out [268] to show up with only five individuals in it, they shortened the performance evaluation form from the 23 items that we originally worked with to just 14 items. They excluded the nine items that represented the highest two levels of job complexity or performance, and at the time that they came back to do the study over again, this time using all of the individuals they could locate who were on the job and for whom we had test scores, they didn't have time to go out and change the evaluation form or reprint it, so they went with just the 14 items out of the original 23.

And prior to lunch you asked me if I could show on the board why we find a difference in those two validity coefficients, the difference between .71 and .41. I think I probably can.

In the original study, as I mentioned, we had 23 items and we divided this variable of job performance up into five

different levels of complexity of jobs. Since they eliminated the top nine items and the top two levels, their scale of performance only went this far, so that if you are to plot where an individual stands in terms of his ability to perform the job on this scale and his performance on the test, we have eliminated this area, and all of these individuals who were in this area have to thus be moved over into this area.

[269] That changes the shape of this, and of course I've said before the shape of this corresponds to the correlation. As this shape goes from a line through this football shape to a square or curved or funnel shape to put all these people in this area, it loses this numerical index, so it drops from .7 to .4, and that is probably the reason why you find this difference if you look at the two studies, but it really doesn't make any difference anyhow.

Q. Why is that? A. Well, because all they were trying to do was determine whether or not the tests were valid, and the test can be valid with a .4 or a .3 correlation or even lower than that. That means if they are valid, they are doing a service in terms of predicting performance on the job from performance on the test.

Q. So whether it is .3 or .4 or .71, within psychological circumstances all of those scores would in fact be determinative of a valid test? A. Right. All of those correlation values that you mention would in fact indicate if they were significant—and all of these were—that the test is a valid predictor of performance.

Q. And do I also understand that the National Compliance Company did in fact in their validity study not consider the total job, but merely portions of it, leaving out the higher levels? A. That is correct.

Q. The validation study the company performed examined the total instrument job? A. Yes, it did.

Q. Now, in utilizing the test with respect to this grievance and the men involved in this case, that test was utilized on the basis of the company validation study or the Na-

tional Compliance validation study? A. The company's validation study. The National Compliance study did not occur until—well, this study wasn't put together until this year.

Q. And that was either a valid or not valid type study for purposes of this Title VII case? A. That is correct.

MR. HOUGHTON: I believe that's all I have.

[270] BY MR. LEWIS:

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[293] MR. LEWIS: Well, I could take the position there shouldn't be any tests at all. I have pretty good evidence that there shouldn't be.

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[295] Q. (By Mr. Lewis) Let me ask you a couple of questions on your direct testimony, Mr. Roskind. On your graphs I'm [296] interested in what is known on this axis here as—is this job performance? Is that right? A. That is correct.

Q. What do you mean, job performance? How did you get job performance? A. In this particular case the way we got the measure of job performance was to use the scale of 23 items selected by the technical engineers in the plants to represent tasks that are typical of the job instrument repairman and vary in complexity from simple to very, very complex tasks.

Q. They are just the tasks; not how people perform them? A. They are the tasks and whether or not people can perform those tasks to a degree of proficiency.

Q. That's my trouble. How do you arrive at how Jim Jones performs well? A. In order to answer your question may I ask you one? Have you seen those 23 items?

Q. No, but I mean no matter what they are, see, what you are saying is there is an axis there called job performance. A. That is correct.

Q. And I'm wondering how you arrive at where you put people on that? Are you just talking about the task which

the job calls for or are you talking about how well the men perform the tasks? [297] A. May I use one of those documents?

Q. Sure. A. I mentioned that we obtain the measure of the man's ability to perform his job by looking at 23 different tasks that men are asked to do on the job. I would like to give you some samples of those various tasks. In terms of pressure measuring instruments, one of the tasks was: "Install mechanism and calibrate a Bourdon tube pressure gage."

A second task: "Install a new diaphragm and calibrate a draft gage."

These are some of the tasks. They go in range and complexity to something involving—these two are under the area of pressure measuring instruments. We looked at temperature measuring instruments, level measuring instruments, flow measuring instruments, alarms and trips, plant water practices, some miscellaneous tasks like troubleshoot control air dryer malfunction, up to some control systems and components; for example, "Set up the boiler feed pump recirculation control system with newly-installed instruments and controls." I'm not going to go through all 23 tests, but these are the types of things that the instrument man does and is expected to do.

Q. Is that bottom line on the graphs symbolic of the task or symbolic of how the people perform the task? That's my [298] trouble. A. Okay. I'll tell you what it is symbolic of. We asked for and obtained a measure of the man's ability to perform each one of these tasks.

Q. Who did you ask that from? A. The individual that the instrument man works for.

Q. Oh. Then it is a matter of the supervisor giving you his judgment as to how well people perform? Is that what you are talking about? A. It's not just the immediate supervisor. We in each case asked for at least two supervisors to independently evaluate each individual's ability

to successfully complete one of these tasks under three different levels of efficiency.

Q. Then the bottom line is not a mathematical certainty or a statistic? It is a judgment? It derives from somebody's judgment of how good a man works? A. It's an evaluation of this man's performance on the job as taken from the sample of the job.

Q. But the test is a mathematical figure, isn't it? A. I understand what you are getting at now.

Q. In other words, my trouble is on the one axis you've got your test scores, how well people perform on tests; is that right? A. That's correct.

[299] Q. On the other axis you've got somebody's report of how they think people do on jobs. A. We also have a numerical value on that other axis.

Q. How did you get a numerical value from a supervisor's judgment? A. The performance evaluation was scored in terms of the proficiency of the individual in accomplishing that, in terms of whether he could accomplish it by himself independently, whether he needed some assistance in accomplishing it, or whether he needed a great deal of assistance in accomplishing it, the number of items that he could accomplish, and by multiplying the evaluation on each items by the number of items that the individual could accomplish, we arrived at a score for each individual.

Q. You mean the man agreed with the supervisor that he could or could not do certain functions alone or that he needed help on others? Is it a matter of mutual understanding between the employee and the supervisor, or the supervisor just says, "I don't think that bird can do something alone and I'm going to report it that way"? A. Well, I don't think it was either of those.

Q. How was it done? A. I think the supervisor sat down, and based on his knowledge of that man's ability to do the job, he evaluated him in [300] terms of his performance, his ability to complete a specific task. And as I

said, we did not accept the evaluation of just one supervisor. We had at least two supervisors for each case, and unless there was complete agreement or a very high level of agreement between the two supervisors, it was not used.

Q. But it was without the knowledge and consent of the instrument man at the time; is that right? A. I don't know whether the supervisors asked the instrument men if they could evaluate them or not.

Q. On these tests do you give any differential for reasons of age or reasons of service? Let me give you something that has been bothering me, going through my mind while I've been on this case. Suppose the six applicants who applied for the job were all 60 years old and they were all former instrument men, pretty good ones, I suppose, from other places. How would the test batteries look at that with respect ot the age and experience of these people? A. In terms of the two tests that are currently in the instrument man battery, the Minnesota Paper Form Board Test is a very reliable test over the entire age range. Once a person reaches the age of about adulthood, about 21 years of age, the performance in the Minnesota Paper Form Board is neither increased nor decreased with age other than as a result of [301] vision, which can be corrected, you know, in terms of wearing glasses. There are some tests that do differ with age. When those tests are used in a test battery, a correction for age is also used.

Q. You do give credit for age or a correction? A. There may be credit or there may not be credit, but I'm saying a correction is made for age.

Q. Correction in favor of the applicant or what? A. It would depend on that specific test.

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[304] Q. Okay. You went from a three-tier system, is that what you called it, or three-marking system, "acceptable," or "not recommended," and "recommended"; right? A. We had three evaluations.

Q. All right, three evaluations. When you went from three to two, would you mind illustrating on the board to us how you [305] dovetailed the three into two. Did the "acceptable" category join with the "recommended" category, or did you take half of it or what? Do you understand my question? A. I think so. If this is the entire range of performance from low to high on the test under the previous system—and I can't pin it accurately on this narrow scale, but let's say we had a range that was "not recommended" and a range that was "acceptable" and a range that we called "recommended." I'm not saying this is the proper ratio; I'm just showing we have several ranges.

Q. Fine. A. The new evaluation would be something like this. "Acceptable" and "not recommended." In other words, the line is now somewhere in the area that the "acceptable" range was in before, so that in effect in reference to these postings, the way they are stated right now, if an individual under the old system had to have the 'recommended," he had to actually obtain a higher score on the test, so in effect more individuals are in fact meeting this standard, because this "acceptable" range has been lowered from the "recommended" which is what in effect the technical engineers in th plants were actually demanding in terms of the people they were considering.

Q. You had a range here of "recommended," right? [306] A. Yes.

Q. And then you had another range of "acceptable," right? A. Yes.

Q. So that this piece now from here to here—do I make it clear?—is lost from the "acceptable" standpoint? A. That is correct. We are able to make a finer discrimination now with this test, and this is where the cutting point belongs.

Q. How did you arrive at that? What is your justification for, let's say, splitting it down the middle between

"recommended" and "acceptable"? A. We didn't split it down the middle. It is closer to the "recommended."

Q. All right, whatever it is. How did you go about it? A. We sat down with the data that we had which reflected the individuals performance on the job, his performance on the test and——

Q. Let me stop you there. You are talking about the supervisor's reports of performances on the job? Is that what you are talking about? A. Their reports of their observations of performance on the job. We are not talking about their evaluations of this integrity or his initiative or his motivation or his cooperativeness or anything like that, just their reports of [307] their observations of his performance on the job.

The technical engineers identified for us the minimum level of performance that was satisfactory for performance on the job as they saw it. We divided the instrument men up into two groups, those who were successful on the job or satisfactory, who were performing the job in its entirety, and those individuals who could not perform the job in its entirety, and then plotted their test scores on a graph, and you have a copy of this in this document that we gave you, this validation study.

Q. These were their old test scores? A. These were the original test scores plotted against a cumulative frequency percent. We obtained two different curves, a curve for the individuals who were considered poor performers on a job, and the second curve for the group of individuals who were considered successful or performing the job in its entirety.

This axis represents again the test scores, and without knowing who these individuals are that are falling on these curves, we look for the point that gives you the maximum discrimination between these two curves, and that fell at 10.3 on the battery score of the individuals

who had taken the test, and that is where the test cut-off was then established, at 10.3.

[308] And the reason for establishing it there is that that allows us to maximize our prediction in terms of who will be successful on the job based on their performance on the test. That is a standard procedure that is used by anyone doing this type of research.

Q. I'm sorry. You took the poor performers and the good performers, right? A. Right.

Q. And you struck it down the middle? A. No, it is not down the middle. My graph doesn't show this very well. If you look at the graph in this validation study that we gave you a copy of, you will see that this line actually falls at a point that gives you the maximum distance between these two curves.

Q. Maximum distance between the two curves? A. That is correct, which gives us or allows us the maximum discrimination that can be made among those two groups.

Q. Now, these poor performers are on the job? A. That is correct.

Q. And it is somebody's evaluation that they are poor performers? A. You might say if it were up to the supervisors or engineers, they would just as soon not have them on the job.

[309] THE ARBITRATOR: To make sure I understand this, what you are saying is you took a score which would represent all of the people who were represented as high performers and the net percentage of those at the top of the poor performance level; is that it?

THE WITNESS: This represents the individual scores of an individual on this test. What we do is we take this group of poor performers and start plotting, and this ranges from 0 to 100 percent of the group of individuals. As you plot this, you find that if you've got a normal

distribution of performance, you will end up with this 'S'' shaped curve, this sine curve. You end up with that sine curve for both groups.

Then the point is to pick a point that will give you the maximum discrimination between those two groups.

So that you do have some overlap. You have some of the poor performers actually performing well on the test.

THE ARBITRATOR: That gives you what amount of the error of estimate, I suppose.

THE WITNESS: Actually it really just gives you the cutting score. I don't think you can determine the error of estimate from this, not directly from this.

Q. (By Mr. Lewis) How many people were involved in this particular thing? Do you know? A. In that particular study that we are talking about right now [310] there were, if I recall correctly, 33 individuals.

Q. From different plants? A. Yes.

Q. Monroe included? All plants? Or don't you know? A. If there were instrument men working at Monroe at that time, they were included. It was from all plants.

Q. What year was this? A. This study was done in early '69—or I'm sorry, late '69 and early '70. I don't know whether Monroe was staffed. My memory is not clear on when Monroe was staffed.

Q. I don't either. But then you went to the other plants? Is that what you are saying? A. To all plants that were operating at the time.

Q. Instrument men? A. Yes.

Q. Both the As and Bs or just the As? A. Just the As.

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[315] (Short recess)

Q. (By Mr. Lewis) Does Edison buy all of its tests now from vendors or do you make some or do you revise some

you buy? A. We don't buy all of our tests from vendors or publishers. We do in fact make some of our own tests, and offhand I can't think of an example of taking someone's test and revising it or changing it at this point.

When you make tests of your own, what do you do? Something like the supervisors committee at the head of the table, or is it some other pencil-and-paper type thing? A. Not all of the tests are paper-and-pencil tests. When we construct a test we decide on ability that we feel is relevant to the job under consideration.

We normally look at tests that are available commercially, tests that are being used by other professionals, whether they are available commercially or not, and may in fact decide to construct our own test, and whether it becomes a paper-and-pencil test or some other [316] form of a test would be dependent upon the job that that test was supposed to accomplish.

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Mr. Lewis: My last set of questions for cross examination to Mr. Roskind is a look at Company Exhibit 5.

Q. (By Mr. Lewis) Addressing yourself to Company Exhibit 5, [330] the first section of the EPSAT Test is vocabulary. How is that essential to an instrument man's job? A. Are you referring to this?

Q. Yes. It is called vocabulary, item 1. A. The vocabulary section of the EPSAT Test deals with physical science terms, whereas the vocabulary that you have in this exhibit deals with general terms.

Of course in the test we are attempting to get some measure of this individual's aptitude in the area of physical science.

Q. Physical science? A. Yes.

Q. This looks like a cross word puzzle to me. It's what I do in the paper every night. Is this the kind of thing you are talking about? A. This is the format of the items. The items themselves are different. Instead of being general vocabulary as this exhibit is, the words that you are asked to deal with in the vocabulary section of the EPSAT Test deal with vocabulary in a very limited, very specific area, the area of physical science.

Q. But you haven't told me yet how that relates to a man fixing a group of meters. You told me there's a lot of work there and so forth and they are words that are identified with [331] something or with the job. Is that what you are saying? A. The words themselves are not necessarily words that are used per se on the job. We are looking at an aptitude, looking at an ability to learn in an area, and the individual's demonstration of his ability to deal with vocabulary in physical science gives us an indication of his ability to master this area.

Q. Do you buy the vocabulary tests? A. The vocabulary portion of the EPSAT Test is a part of the test. The test comes as a package.

Q. The authors of the test had no idea you were going to apply it to an instrument man. Isn't that the point? A. The authors of the test selected a group of standard tests. When they put the EPSAT Test together, they selected tests from several other different areas. They specifically had in mind attempting to predict the ability of individuals to successfully learn physical science principles and then deal with those principles in a specific type of job. This was done under the direction of the Department of Defense during World War II.

Q. All right. Is the same vocabulary test used for different jobs, say mechanic-fitter, bricklayer, electrician? Is it used for clerical help, professional help, technical help, the same vocabulary test? [332] A. This particular test

is used only for the instrument man test battery in this company.

Q. This specific vocabulary test? A. That is correct.

Q. Other vocabulary tests are used for other jobs such as I have enumerated? A. Yes.

Q. But you have to pick and choose your vocabulary test that you want to give? Is that what you do? A. That is correct.

Q. Oh, I see. The authors make up dozens of these combinations? Is that what you are saying? A. There are probably dozens of vocabulary tests on the market, yes.

Q. And you select one which you think would be most useful for the bricklayer and most useful for the mechanic and so forth? A. We don't have vocabulary tests for bricklayers and mechanics and masons. We have one for use for graduate engineers and we have some vocabulary items in a Wonderlic Test, and this is the only other vocabulary test that is used by the company as far as I know.

Q. And for whom do you use this besides instrument people? A. We don't use it for anyone else besides instrument people.

Q. But you use vocabulary tests for other people, you said. [333] A. I just got through mentioning we have a——

Q. Engineers? A. Graduate engineers and other technicians.

Q. What kinds of jobs would they be? A. These are people with a two-year certificate from an advanced technical school.

Q. You mean relay technician? A. Relay technician.

Q. Okay. Is that all or are there others that you can think of? A. There are no other tests in the trades where we use a vocabulary test.

Q. Just those that you gave me? A. That is correct, and this is not really a vocabulary test.

Q. Well, that's what it says. I'm only quoting what it says. A. What we are actually dealing with is a verbal comprehension test, the ability to understand or comprehend these technical terms and the way they are used as a measure of aptitude to learn the things that are necessary to learn to perform the job and to deal with the contents in the job.

In this particular exhibit that you have here it is called a vocabulary test. The items look very much like that except they are different words.

Q. All right. The second test, general information, is not used in the specific tests we are talking about? [334] A. That's right.

Q. The third test is arithmetic. A. Yes.

Q. Well, I will stipulate with you that some arithmetic should probably be necessary from an instrument man's standpoint. Is this the range of it? A. That's not the complete range of the test, no.

Q. What is the overall range of the arithmetic test? A. I'd have to pull out a copy of it and look at it to tell you. But it deals with working with fractions, if I recall correctly, with decimal points and to some degree some algebra.

Q. Is it in the test? A. If I recall correctly, yes. I don't have a copy of the test to look at.

Q. Does it go further than algebra? A. It may have some elementary geometry. I'm not sure. I'd have to check and see.

Q. Does it go into trigonometry? A. No.

It may involve algebra and geometry, some? A. It may.

Q. Other than that, it's multiplication, addition, use of fractions? [335] A. That is correct.

Q. The next item is number series. You say that is not used? A. That is correct.

Q. The next item is figure classification. You say that is not used? A. That is correct.

Q. The next is mechanical comprehension. Now, why and how is this relevant to the instrument man's job? A. This test deals with the ability to deal with mechanical principles, and I think you might even stipulate that the instrument man's job involves some mechanical principles dealing with gears, levers, buoyancy, weights, volumes, balance.

Q. I would stipulate that much. I will stipulate that he deals with electronics and meters and recording instruments and things of that nature, yes, but some of these things are sort of little trick questions, in my opinion. A. That raises an interesting question, Mr. Lewis.

Q. Go ahead. A. In most of these standardized tests that have been developed and normative data has been gathered on, an effort has been made to eliminate the trickiness of a question. The entire purpose of testing someone using these types of aptitude tests is to get the most accurate estimate of the individual's [336] ability that one can obtain through a paper-and-pencil test.

There is always someone around who can design a clever tricky question that will in fact trap somebody while they are taking a test. I think we can all generate those kinds of items. But if you want to get the best estimate of the individual's ability, you must in fact insure that the items are of such a nature that if the individual understands the mechanical principle in this case, that he should be able to solve the problem. Otherwise you are getting a measure of how tricky your questions are rather than the individual's ability. So a lot of effort has gone into taking trickiness out of the items.

If an individual gets one of these items wrong, it is normally because he does not understand a common principle rather than that he was tricked into missing it.

Q. Well, I'm not so sure that the instrument man would have to know the principle involved in, for example, 3, right, figuring the volume and area of a cube versus a cylinder. Why would he ever reach that point? A. I'm not an expert on the job of the instrument man, but if I understand some conversation that I've heard, I understand that the instrument man works with displacement and buoyancy and calibrating instruments and the principles that the instruments operate under, and in order to use those [337] principles, apply them to the job, an individual would have to understand the concept of volume, which is probably the underlying principle in this question.

Q. What about item 9, the airplane? A. Before I go to every single item——

Q. I'm not going to cover every one. This is all. I'm just going to ask you a few. Why would item 9 be relevant, a little bit of aerodynamics or aeronautics? Why would he have to know this? A. What we are talking about here is resultant forces, and if I understand correctly again, the instrument man deals with resultant forces.

In an aircraft operating, with one engine stopping all of a sudden, you've got about six different forces operating at once, and unless you can in fact anticipate and understand which forces are going to operate, you can get yourself into serious problem in an airplane and I imagine you would be unable to solve some of the problems that the instrument man solves in terms of the measurements that he is trying to take in calibrating instruments and in understanding the operation of an instrument.

Q. Well, the instrument man may very well understand the principle of forces in his particular territory, in his shop, [338] but he may not understand the forces which take place in the airplane situation. A. If he fully understands the principles of forces, he may in fact do very well and there is a high probability he will understand the forces in a different situation.

It is a question of the underlying principle. If you understand the underlying principle, you should be able to take that principle and apply it to situations with which you have not previously worked. Otherwise we would have to have an instrument man asking somebody a question every time he came upon a new situation.

Q. Are these, generally speaking, items which should have been learned in school? Is that what you are saying? A. Some of these items are learned in school. Most of them are learned over many, many years of dealing with mechanical types of experience through experience in mechanical processes.

Q. I will agree that the calculation of volumes and areas and that cube and cylinder is learned in school, but I doubt if I ever learned anything about the airplane in school. A. Okay. I don't know whether you learned anything about the airplane in school or not, but you may or may not have learned something about forces in your everyday life as you drive a car.

[339] Q. All right. Word recognition is not used, it says here. Scrambled letters is not used, it says here. A. That is correct.

Q. Checking is not used, it says here, and then we get to the paper form board. Now, as a psychologist, why is the paper form board test relevant to the instrument man's job? A. Mr. Kanous yesterday spent quite a bit of time describing the relationship between these items and the instrument man's job. I could say in short that I agree with him thoroughly in terms of his explanation of that. I don't think I could say it any clearer. I can repeat it.

Q. Well, I didn't have this exhibit when Mr. Kanous was on the stand, of course. I got it later. You might summarize it. A. The ability to solve the problems that are demonstrated or listed in this particular exhibit calls upon an ability that was studied before the turn of the century and was confirmed back in 1930 as the ability to deal with

spatially-related objects. In other words, what this test purports to measure then is the ability for an individual to deal with spatial relationships.

Q. It is a jigsaw puzzle type of thing? A. I've never heard it described that way, but I guess you would call it sort of cut-up or a jigsaw puzzle. It is far more complex, though, in——

[340] And I described the vocabulary as a cross word word puzzle type of thing. A. Yes, you have.

Mr. Lewis: It is very much what I do all the time in the papers, relate one word to another in filling a cross word puzzle.

I guess I have no further questions for Mr. Roskind.

The Arbitrator: Mr. Houghton?

Redirect Examination

By Mr. Houghton:

Q. Just a couple. Mr. Roskind, if one were to undertake this exercise that Mr. Lewis has been putting you through with respect to all of the various questions on the EPSAT Test and the form board test, would that in any way indicate to you or a competent psychologist whether the test was a good or a bad test or a valid or an invalid test? A. If we sat down and went through each one of those items on some test that I was not familiar with and on a job that I might be familiar with in great detail, I could not tell you whether or not there was a significant relationship between the items on the test and performance on the job just by sitting down and looking at each one of these items and trying to determine why or how that item might be related to [341] performance on the job. So in other words, no.

In fact, it would be very, very difficult to really determine what principles from looking at the items or what

job you might be considering, so looking at the items in and of themselves tells you nothing.

Q. Am I also correct that merely because you might go through here and identify a particular item, say item number 3 under mechanical comprehension, involving the situation asking whether the cube or the cylinder weighs more, that whether or not you on the face of that item could see that it related to the job or not also would not have anything to do with whether the test was valid? A. We might obtain complete agreement from every single instrument man in the company that that would be a valid item because it looks like something that they do on their job and in reality it may have no predictive value whatsoever. It may have no real validity. It may only have face validity. That's a possibility.

Q. And the way you actually go about determining validity for these particular items is how? A. Through a standard statistical process of validation.

Q. Like the validation experience you have explained to us earlier today? A. Yes.

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[343] THE ARBITRATOR: I would like to ask you the same question that I asked Mr. Kanous. I notice in the job description that the complete analysis is not contained here. I don't know what credit is given for education, but on the job vacancy notice it says: "Must have satisfactory credits in high school level math (two years) and science (one year). Proof of these qualifications will be required."

Will the quality of these high school courses affect a person's ability to score high or low in this test?

THE WITNESS: I would think that there would be some impact as a result of the quality of the courses, although we've got some evidence now as a result of a rather large-scale project called Project Talent that the federal government has been involved in for many, many years,

and as much as we have been led to believe that the quality of the building that we teach our students in—I'm talking about the elementary through high school——

THE ARBITRATOR: K-12.

THE WITNESS: ——and the quality of the teachers and the environment and many other factors play a major [344] role in how well the students do in terms of academic achievement, this recent study tends to indicate that one of the major factors is the students themselves who enter, and there are some students evidently who regardless of the quality of the education they get are the kind that learn the subject anyhow and in many cases some of the students regardless of what quality of education is given them in terms of good quality fail to benefit from that education, and it seems to me that the student himself or herself tends to be the major source of variance in terms of academic achievement.

THE ARBITRATOR: Well, I think that might be correct, but I guess the one part of the exam which I am specifically directing my attention to would be the vocabulary part, and you are telling this panel that these items are taken from physical science.

THE WITNESS: Yes.

THE ARBITRATOR: So I assume there are such words maybe as "force" or something like that.

THE WITNESS: Yes. In fact, there are two samples right here.

THE ARBITRATOR: Oh, really? That shows you how well I have studied all these exhiibts to this point.

"Iron is a metal. Water is a solid." But you have a multiple choice operation under your test that you——

[345] THE WITNESS: I'm sorry. I've got that confused. That is not the verbal comprehension portion; that is the

physical comprehension. But those are the kinds of terms that you might expect to find.

THE ARBITRATOR: Yes, but if you had the format of the vocabulary part which is contained in this particular booklet, Exhibit 5, and you had a word like "force," let's say, which perhaps isn't a very good example but let's use it, and then you had five choices, basically what you are doing is you have to know what "force" means and then relate it to another word.

THE WITNESS: That's correct.

THE ARBITRATOR: Here I guess I am not speaking with a great deal of expertise on high school education these days, but in the old general physics course one would assume you would run across some of these words. Is that a function of memory? Is that what you are getting at here?

I guess I am having difficulty relating that particular section of the test to mechanical aptitude rather than just pure memory.

THE WITNESS: This relates more to physical science aptitude, and a basic part of the instrument man job and of the training that he undergoes in order to accomplish the job does deal with physical science principles, and the vocabulary [346] section itself gives us an estimate of this man's ability in this area of physical science in terms of his understanding of these concepts.

THE ARBITRATOR: As of now?

THE WITNESS: As of now.

THE ARBITRATOR: So that if he hadn't had too much of that course, he may not have it now? I guess that is what my question is directed to.

THE WITNESS: That is true. He may not have as much as someone who has had a course, except that most of the

physical science concepts are ones that an individual would pick up outside of a physical science course also.

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[353] BY MR. HOUGHTON:

Q. Let me button this up to make sure I understand the point. Let me take this hypothetical, Mr. Roskind. Assume that a man has talent, and we will define talent in this case as an innate ability to be a good instrument man. That is the talent he has.

If he has that innate ability, that talent, and he comes along and takes your test, what is likely to be the result? A. It is quite likely that he will be able to identify that he has that talent.

[354] Q. He would presumably be a high-scorer on this battery?

THE WITNESS: That is correct.

MR. HOUGHTON: I have nothing further.

RECROSS EXAMINATION (Continued)

BY MR. LEWIS:

Q. But he may not be? A. Anything is possible with the degree of statistical probability.

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Respondent's Exhibit No. 9

[358] (Discussion off the record)

THE ARBITRATOR: Do you have any objection to Union Exhibit Number 7?

MR. HOUGHTON: No, other than the one stated on the record. I don't think that there is any showing yet that it is relevant to this proceeding, and I would just reiterate that the discrimination which is sought to be guarded against through the regulations of the Equal Employment Opportunity Commission by definition in Section 1607.3 applies to employees in classes protected by Title VII, and we have, of course, no showing in this case that we are involved in any discrimination like that. There are general policy guidelines. For whatever they may be worth in this case, we have no objection to your reviewing that.

MR. LEWIS: Well, the response to that is, of course, our contract covers all employees within the bargaining units, affected classes, unaffected classes, Indians, Irishmen, Catholics and Protestants, and the causes we try in these cases don't have anything to do with ethnic conditions at all. They cover everybody. Edison doesn't have several contracts, one for each ethnic group.

MR. HOUGHTON: No, I agree with that. That's why I say the contract is relevant but not this. This applies [359] to only certain special groups.

MR. LEWIS: The point is if this causes a change in the contract, it causes a change in the contract for all the ethnic groups under the contract, not just one.

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[399] MR. HOUGHTON: Before we proceed with our last witness there was one other side track that perhaps we ought to try to reconcile at this point, and that involved the introduction of sample type questions on the three

parts of the EPSAT test that Mr. Lewis did not feel had been sufficiently covered earlier.

With respect to the physical science comprehension test, the only samples that we have been able to [400] find are that one that is already exhibited on Company Exhibit 5.

With respect to the formulation section, we have found a series of questions that do reflect the type of questions used in the formulation section. The entitlement of this document is "Part Three: Mathematical Reasoning." This gives an example of the range and type of questions that would be found in that section of the test. We would propose that as Company Exhibit 8.

(Company Exhibit 8 marked for identification)

MR. HOUGHTON: The third section involved in the EPSAT Test that we did not as of the last hearing have examples of was the arithmetic reasoning section, and we have a series of examples of that type of thing indicating the range and type of question that would be found on that portion of the EPSAT Test. The document that exhibits those questions is entitled "Instructions for Part III."

We would propose that as Company Exhibit 9.

(Company Exhibit 9 marked for identification)

MR. LEWIS: I have no objection to these, but it doesn't finish the job by any means. These are steps in the right direction.

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[401] FRED J. LOCKE

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOUGHTON:

Q. Mr. Locke, will you give us your full name and position with the Edison Company. A. My name is Frederick James Locke and I am technical engineer in the Monroe Power Plant.

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[405] Q. Can you give us, if you will, sort of a quick summary or layman's understanding of what type of instrumentation you have at Monroe and what these instrument men do there. Generally what does their job cover, and is it strictly repair work or is there troubleshooting work involved? What do they do on a regular basis? A. Well, a lot of the instrumentation at Monroe is similar to other plants with the exception that we have a lot more solid state electronic equipment in much larger degree than any of the other plants. However, we still do have the [406] range of pneumatic controls, pressure gauges, thermocouples, level transmitters similar to other plants.

Now, the instrument repairman's performance on this equipment does involve maintenance of this equipment, but it also involves troubleshooting of control systems, and this type of troubleshooting would involve not only troubleshooting electrical or electronic systems, but in part pneumatic systems.

In addition to the troubleshooting, of course, they are involved with calibration of all of the instrumentation. In fact, this is one of the basic responsibilities that the instrument repairmen had when they first came down to the plant, to do all of the initial calibration work and check-out work on the controls and instrumentation after they were newly installed at the plant, so they did all of this initial calibration and check-out. This also included a lot of circuit check-out work to make sure that the circuits were functioning properly before this equipment initially went into service.

But in addition to that, now that the equipment is in service, they still have the responsibility for maintaining

these systems, troubleshooting and repairing any deficiencies that should show up or malfunctions that should show up. I think that covers it broadly, basically [407] what they are involved with at Monroe.

Q. How many instrument men do you have down at Monroe? A. Right now we have 12 instrument repairmen.

Q. Is that approximately the number you had when you filled the vacancies that are at issue in this case? A. No. At the time we had six men in the group and at the time when we filled these vacancies, we were expanding the group from six to 12 men.

Q. So in filling these vacancies you brought it up to the complement of 12? A. That's right.

Q. Now, in terms of this broad outline of work that you have described, are the instrument men expected to be able to do this work on their own? A. That's correct.

Q. This includes the calibration, troubleshooting and so forth? A. That's right.

Q. In other words, in layman's terms, if you are at one of the control boards in the plant and assume you are getting a false signal that indicates trouble when in fact there is no trouble, an instrument is malfunctioning. You would call an instrument man in and ask him to analyze that situation, find out what was wrong and repair it? A. That's right. There are some systems of a very complex [408] nature in which technician or engineering help may be required, but when you are talking in terms of control loops of not great complexity, we would expect an instrument repairman to be able to handle this.

Q. In terms of selecting instrument men, the six in question in this case, to fill out your complement down at Monroe, did you personally have a hand in that? How did you first get involved in that? A. Yes, I was responsible for setting up the initial posting for this job and I was involved with the actual setting up the screening of the bids that we received, the evaluation of the bids. My instrument

foreman assisted me in the evaluation work, and also the final selection of the candidates, of course, was my responsibility.

Q. Did you also take part in determining the basic requirements for the job as set forth in the posting? A. Yes. Previously the basic qualifications that were set up in the posting was established by the technical engineers. The department had actually directed a committee which was composed of all the technical engineers in the department to recommend the posted qualifications for the instrument repairman's job. I got in on the tail end of this when I first became a technical engineer, but the final format of the posting that we see right now, I was involved with the [409] setting up of those qualifications.

Q. Now, with respect to the qualification pertaining to the aptitude tests that we are talking about in this case, did you have occasion prior to finalizing those standards as set forth in the job posting to learn something about that test or review it with any of the other tech engineers or anyone from the the psychological testing department? A. Yes, I have.

Q. What were you involved in in that regard? A. This was again when I just assumed my present position. Just prior to that the technical engineers had approached the Employment Department psychological division on the test which was already established on the old standard and had voiced the opinion that this test was not adequately, in our estimation, developing or, let's say, selecting instrument repairmen with the aptitude for instrument work. In other words, we were questioning if maybe the test was not selective enough.

And then just prior to my getting into it, I believe the psychological division had decided to revalidate the test, and at this point, very soon after I became technical engineer, is when Dr. Worbois presented the results of the revalidation of the tests. I happened to be in that meeting where he presented it—much of what [410] he presented

was very similar to what Mr. Kanous presented here at the arbitration—to help us gain familiarity on the validation methods and how they evaluated the test itself, and also how they broke down the method in which they determine on how an individual scores just how he would be—would he have a suitable aptitude for instrument work or not have a suitable aptitude.

Of course, in these sessions the exact test itself was not presented, so I was not familiar with the exact questions on the test or actually how the test was conducted. But as a result of this presentation I was aware of how the test was validated.

Q. On that basis did you then go ahead and use the basic requirement of a successful score on the test for the instrument men posted job? A. Yes, as a result of the presentation, and the technical engineers group on the whole was satisfied that what was being presented to us from the validation studies would give us a test that would adequately predict instrument aptitude. I was in full agreement with this conclusion of the technical engineers, and it was decided at this point here that the aptitude tests should be used as one of the qualifications.

Q. Am I correct that this basic requirement of using the [411] aptitude test is common throughout the Production Department, not just at Monroe Power Plant? A. That is right.

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[415] Q. So that out of the 10 from Monroe then, we have two that did not take the test? A. That's right.

Q. And eight that ultimately ended up taking it? A. Yes.

[416] Q. Out of those eight were there any that received an "acceptable" score on the test? A. No, there were none.

Q. Now, after all these eight people had taken the test, and after Mr. Girrbach and Mr. Andrews had been given the opportunity, and you received the results, what did you do? A. Well, of course, first of all, I received the results

of the first seven candidates. Seeing that none of them had passed the test and had not met one of the qualifications that we stated here, at this point here I could see no need to go any further into checking the rest of the qualifications, because at this point here I would have to eliminate them from further consideration from the job.

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[419] Q. As I understand it then, you still had five openings to fill and you had seven people who had met all the basic qualifications, including passing the test. A. That's right.

Q. How did you go about determining which five out of those seven should be given the job? A. Well, the next step now is to check the rest of the qualifications. Of course a lot of this, like attendance, we were able to receive their attendance records. However, at this point here it did require actually having to go out and interviewing these people, because there were a lot of questions on these qualifications which we would not be able to obtain answers to except by way of interview.

So the next step was to establish interviews with the people. I conducted most of these interviews although my instrument foreman assisted me on one of the interviews.

In the interviews and also based on the applications that we had received, I was able to determine that all of these people had met the education requirements.

As far as attendance was concerned, there was [420] a question on attendance of three of the applicants, but again as a result of the interview we were able to determine that despite what was evident from their past record, there was a satisfactory explanation for what was shown on the record and that their attendance record was acceptable to meet the stated qualification.

The other thing we wanted to determine too in interviewing these people is was there any physical disability

with the individual which would make it very difficult for him to handle a job of this type, and of course as a result of these interviews there was no question about physical disabilities with the exception of one candidate, but we were able to clear that up with a subsequent physical exam.

Q. As a result of this examination then, as I understand it, all seven of these people in fact met your basic requirements for the job? A. That's right.

Q. Now, as a result of this analysis and looking into whatever you may have looked into, including related work experience and so forth, did you find that any of those seven applicants were "head and shoulders" above any senior men? A. No, not really. Once we found that they had met the basic qualifications, of course we did review their background, [421] service, experience, any additional education they had, but we really could not find anything that we would consider "head and shoulders" in the background that would possibly accelerate one man beyond, let's say, a more senior man. We did not find anything like this.

Q. So did you then select the five senior men out of that group? A. That's right.

Q. That gave you your six men for the vacancies? A. That's right.

Q. Are these six men that were selected still working as instrument at Monroe? A. They all are right now.

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[425] CROSS EXAMINATION

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[426] Q. With respect to the posting, you said you made it a condition that the successful people had to get a [427] "recommended" score on the test; is that correct? A. That's right.

Q. Were you here at the other hearings in this case, Mr. Locke? A. You mean the previous dates of this hearing?

Q. Yes. A. Yes.

Q. I think the psychologist said they needed a 10.3 cut-off score. Is that correct? A. That's correct.

Q. You are familiar with that? A. Yes.

Q. In other words, if a man got a 10.2 cut-off score, he wouldn't be considered? A. I'd have to assume so, yes.

Q. Or 10.1? A. I assume so.

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[435] Q. What training does the company sponsor for the instrument men? A. Well, at Monroe, of course, we have our own training program which was a program that was established for the department. So far, as far as I know, Monroe and possibly one other plant are using this program.

Q. What is it? Schools? A. It's in-shop schooling as far as the program is concerned.

Q. On-the-job training? A. That's right.

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[436] Q. Now, these men you selected, did they come from instrument backgrounds, the five or six? Well, one did. Elliott, you say. A. Elliott did.

Q. What about the other five? A. No real basic background that I can see.

Q. So they had to learn the fundamentals just like I would if I went there? A. That's right.

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[445] WILLIAM L. ROSKIND

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[447] Q. (By Mr. Houghton) Mr. Roskind, during the testimony in this case we have made reference to the fact that there is a specific battery of tests used for selection in the instrument man job classification. It has also been indicated in the testimony that there are other trade type jobs where specific batteries of tests are used for those jobs. Can you tell us in general, if you can recall, which specific jobs there are batteries of tests designed for? A.

There are actually less than 20 specific jobs for which we have a test battery like the instrument repairman job. There is the job of a power plant operator, the substation operator, the linemen, the cable splicer, the draftsman, the customer serviceman——

MR. LEWIS: Just a moment. Would you repeat them, please? I didn't know you were going to read them off.

[448] THE WITNESS: I may not go through in the same sequence.

MR. LEWIS: That's all right.

THE WITNESS: Meter reader, power plant operator, substation operator, lineman, cable splicer, draftsman, customer office representative, customer serviceman, tab machine attendant, technician. And then getting into some of the other areas more clerical, key punch operator, typist, stenographer. We have a test battery for engineers and another for computer programmers and there may be several others that I haven't mentioned.

Q. (By Mr. Houghton) Those are all the test batteries designed for specific jobs? A. That is correct. We have several other tests then that are nonspecific in terms of a given job. This human relations battery of tests for supervisors, the clerical placement battery and the mechanical placement battery would be tests that would be used for people going into many different jobs.

Q. To differentiate between those two types of batteries then, one is set up and validated for specific jobs and the other is just in general areas such as mechanical and clerical type aptitudes? A. That is correct.

[449] MR. HOUGHTON: Thank you. That's all I have.

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[453] MR. LEWIS: Well, Mr. Chairman, I want to make a few remarks and then call some of my witnesses. There will be more tomorrow, as you know, and maybe with luck we can get done tomorrow.

But I want to just talk a moment about what I consider to be my rationale in this whole case. The contract here says "head and shoulders"—famous phrase—i.e. the man selected must be "head and shoulders" over those bypassed. Thus, a precise cutting-off point is not commensurate with "head and shoulders," in my opinion.

For example, 10.3 being a passing mark, persons getting a 10.1 or a 9.9 are not "head and shoulders" below 10.3, and those getting 10.5 and 10.7 are not necessarily "head and shoulders" above. I don't have anybody's score as of yet, and neither do you. I mean 30 fellows took this test. They haven't had any exhibit showing who got 10.3, who got 10.4, who got 10.5, who got 9.5 and who got as little as 5.6 or something.

[454] My next philosophy is this: The qualification in the job posting—that is, "must obtain a minimum score of recommended,"—is not a licit or legal demand on the part of the management for a qualification in the face of a "head and shoulders" overall criteria.

Next, since the test is but one criterion in evaluating "head and shoulders difference," it cannot be the instrument to foreclose a person, and apparently this is what happened here ostensibly, foreclosed people, this test. Nothing else.

Next, thus far we have only had some sample questions in the Minnesota Paper Form Board Test and five parts of the EPSAT Test, and no scores for the—I was going to say for the 30 or 40 men involved. I could say that because Mr. Locke said there were 30 or 40 people that bid for the job, but the immediate was about 15 people. There were six taken and there were 10 others in the plant that bid, which is 16. But then I'm told one fellow was finaled recently or something, so that reduces it to 15, and another one refused to take the test, so I suppose we could reduce it down to 14 people that are immediately in the picture as compared to the 30 which Mr. Locke's stenographer said

she isolated and held aside while he looked at only the Monroe Plant ones, which I doubt, or if he did, he certainly knew there were 30 others over there that he could get, [455] and he admitted that on the stand.

So those are four principal concepts that I see in this whole case and I still have my petition before the NLRB to proceed and I still have with you the letter asking you to order certain things and subpoena certain things. So that's where I am as of now.

But we have some precedents which I want to first put in where the arbitrator refused to consider the minimum or the recommended score as being persuasive or controlling, and we have others that say the union should see the tests and I will put those in first; then I will have some witnesses, if you don't mind.

* * *

[458] I have indicated to Mr. Lewis that we would be glad to provide the test scores, ranging from the highest to the lowest, for all of these men at Monroe without having a name attached to a particular score so he can see the range and see how close certain scores were to 10.3, if that is of any interest. Thus far in the case I had not understood there was a request for that. If there is a request, we will be glad to provide you that.

MR. LEWIS: Wait a minute. I said to the Labor Board I wanted the tests and I wanted the scores.

[459] MR. HOUGHTON: Well, to the Labor Board, yes. I hadn't thought we focused on those scores in this case. We will be glad to give you that.

MR. LEWIS: How am I going to know who was "head and shoulders" above anyone else unless I get that?

THE ARBITRATOR: Well, you will provide the scores?

MR. HOUGHTON: We can provide that right now.

MR. LEWIS: Well, if it is just going to say A, B, C, D, E, F, G, and A got so much, B got so much, I don't think it's going to do me any good.

MR. HOUGHTON: Let us show you what we would be willing to provide. This document, which we would propose as Company Exhibit 10, is entitled "Battery Scores of Employees in Grievance PMO-123."

(Company Exhibit 10 marked for identification)

MR. LEWIS: We will consider it. That's all I can do at the moment.

THE ARBITRATOR: All right. Company Exhibit 10 is accepted into evidence.

MR. HOUGHTON: Now, the third point that I want to discuss is with regard to the request for tests. As I understand it—and I guess you haven't indicated this, Clem— [460] we have provided you with a rather broad range of sample questions for the form board test and five of the six parts of EPSAT, and as to those areas we consider that to be a fair representation of the questions.

You indicated earlier you were satisfied with the form board and the three parts that we had provided you. You were dissatisfied with the three remaining portions. We have provided you with extensive information as to two of those three. Do I understand at this point what you are concerned about is the physical science comprehension section? That is the only one?

MR. LEWIS: Yes. As I say, when I said we would consider Company Exhibit 10, that doesn't mean I'm totally in favor of it. I just want to give it respect. I'm not adopting it. I want to think about it.

You see, there's a lot of things I don't know about it. For example, what is the best score you can get? I need to know that and a lot of other things.

So rather than say I'm against it, I just tell you I'll give it respect and consideration.

THE ARBITRATOR: Let me ask this: Do you have the range of scores of the 30 people who took the test? Is that right? Did 30 people take the test?

MR. HOUGHTON: I don't think we have that here.

[461] MR. SCHLEICHER: I don't think 30 did take the test.

MR. LEWIS: The question was probably never asked. How many took the test? If somebody knows on that side of the table, I'll be glad to listen.

MR. HOUGHTON: I presume all you are interested in basically are the grieving parties who claim they would have been entitled to the job.

MR. LEWIS: The grieving fellows, yes. But the "head and shoulders" concept I suppose applies to the whole department. I don't know.

THE ARBITRATOR: Well, I was trying to get at Mr. Lewis' request, and I suppose the scores, at least to me, would make more sense if you had some idea of what might be the possible high score that one could receive on the test.

MR. LEWIS: Right.

THE ARBITRATOR: And then how did these people fall into that range. For example, can you get 15 on the test? That's what I'm asking. The 12.8 would represent maybe halfway in the "recommended" group, something of that nature.

(Discussion off the record)

THE ABRITRATOR: I would like one other piece of information too, Mr. Houghton. I would like to know the scores of the two who were in the "recommended" category but [462] did not get the job.

MR. HOUGHTON: You mean the one?

THE ARBITRATOR: I understand that there were seven candidates for the five openings after the incumbent elected to go to Monroe. That means that there were two people who had "recommended" scores but were not selected. They were evidently the junior men. So I would like the scores of the two junior men that were not selected.

MR. LEWIS: Right. The one man transferred laterally.

THE ARBITRATOR: That's the incumbent.

MR. LEWIS: He's on top, yes, the incumbent. Okay. Well, we'll go ahead. Maybe tomorrow we will develop more on that.

THE ARBITRATOR: Let me put this to you, Mr. Lewis, before you get started. I have not had placed before me the precedents that you were talking about in regard to this kind of information. I have not had any opportunity to research on the subject, and my best guess is that we probably will not conclude today until 4:00 or 4:30 and I won't have any opportunity to do that this afternoon.

So if you definitely want me to make a ruling on that question, that I am going to have to have time to look at it. I guess my preliminary view, based upon the kinds of [463] questions that have been placed before us, is that it does give us a fairly good sample of the kind of test that is being used.

MR. LEWIS: Except for one.

THE ARBITRATOR: Except for one. But if you want me to go farther than that, I will have to take a judicial recess.

MR. LEWIS: Okay, let's go ahead.

MR. HOUGHTON: Perhaps we could do this. If he wants to give us copies of these, we can reserve a ruling.

I will state that we will attempt to get a range of questions for the physical comprehension section, but that to date we have been unsuccessful, and Mr. Kanous and Mr. Roskind have indicated to me they don't know of any publi-

cations that exist that have sample questions like that. But we will continue to look and see if we can find anything.

THE ARBITRATOR: Very well. Let us proceed.

MR. LEWIS: The first authority I want to give you is this case on Central Soya Company.

(Union Exhibit 10 marked for identification)

THE ARBITRATOR: I assume, Mr. Houghton, there will be no objections to these. There is no question here as to the relevancy of these to the case.

MR. HOUGHTON: No. As to any of these, they [464] can be admitted as being arbitration decisions that may or may not be in point or be relevant. We would reserve the right, of course, to provide you with whatever authority we think appropriate.

THE ARBITRATOR: Yes. All I am trying to do is save time in terms of getting them in.

MR. HOUGHTON: No problem.

MR. LEWIS: Well, the abbreviated decision on this said:

> "Employer acted arbitrarily when it determined that senior employee lacked ability to perform work of posted job vacancy on basis of (1) senior employee's failure to meet job requirements which apparently were specified for the first time, and without consultation with the union, when job was posted, and (2) aptitude and other general tests which were administered to employee by employer and which union was not allowed to see."

The arbitrator said the employee acted arbitrarily for those two reasons; therefore, the senior employee is entitled to a trial period on the job and so forth. I won't read the whole decisions, but it's there.

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[466] The last one is just a short study that BLS made on the rules of psychological testing.

(Union Exhibit 12 marked for identification)

MR. LEWIS: I have the whole thing here. If anybody wants it, I'll be glad to run it. They studied a great many cases on this business of testing people for promotions [467] and this page gives the results of their findings, really, and under the recommendations it says:

> "It is recommended that tests be used for promotion under the following conditions:
>
> • • •
>
> [468] "3. When the union has been provided the opportunity to see the test but not have it."

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I will first call Fred Malone.

FRED MALONE

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q. Fred, you work for Detroit Edison, do you? [469] A. Yes.

Q. What is your occupation? A. Instrument repairman A.

Q. You have a union job also? A. Yes, sir.

Q. What is that? A. Treasurer of Local 223.

Q. How long have you been with the company? A. Going on 28 years.

Q. Where do you work? A. St. Clair Power Plant.

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Q. That's really what I wanted to know. How long have you been an instrument man, Fred? A. I started at Tren-

ton Channel as an instrument man 3rd in [470] 1947. I transferred to St. Clair in 1952, December 29th, as an instrument man B, and I was promoted to instrument man A in September of 1953.

Q. '53 to '73 is 20 years an A man, right? A. Roughly speaking, yes.

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Q. Did you ever take a test for instrument man B or instrument [471] man A? A. No.

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[473] Q. Taking a look at the vocabulary test, Company Exhibit 5, do you find that relevant to the instrument man job? I'll agree he should know how to read, write and speak English. Will you agree to that too?

• • •

[475] Q. (By Mr. Lewis) Is it necessary that you do some reading of words on the job and know the meaning of such words? A. Yes, I would say so.

Q. Where do you find such readings? Give us an idea. Is it vendors' manuals or something? A. Well, as you are reading a vendor's magazine, if you run across a word you don't know, then we go to Webster's dictionary and find out the meaning of it.

And with new instrumentation there are always new words. I guess every day in our standard way of life there are new words introduced and you won't even find them in Webster's dictionary until the next edition of it comes out.

Q. You mean they are vendors' words, very often? A. Right.

Q. But normally are the words you use and read ordinary words like the newspapers? A. Yes.

Q. And magazines? A. Right.

[476] Q. Instructions, you mean, like newspapers and magazines except for these occasional vendors' words that are mysterious? A. Right.

Q. And no matter who would be reading it, would they find it equally mysterious if there was an unusual word there, in your opinion?

MR. HOUGHTON: What was that?

MR. LEWIS: These vendors' words, these occasional words that you might——

MR. HOUGHTON: Was your question, though, no matter who was reading it, would they find it equally mysterious?

MR. LEWIS: Yes.

MR. HOUGHTON: How can he answer that?

MR. LEWIS: Maybe he can't.

Q. (By Mr. Lewis) Would even the most expert technician up there find a word occasionally that would stump him? Put it that way. A. Oh, I'm sure it happens.

Q. Sure it happens. And he has to go to either the technical dictionaries or call the vendor up and get the meaning of it; is that right? A. Sure.

Q. Okay. The next section of the battery which management presented us says mechanical comprehension. Now, do you [477] occasionally run across some of the principles enunciated by these diagrams? Let's try a few. For example, number 3. Do you ever have to figure the area and volume of particular solids and cones and things like that? A. When we are changing a meter—and maybe I can't put this in the right terms for this group. Say we are changing a meter from a 120 inch meter to an unknown meter—they don't even make a meter as such, but we want to make it a 50 inch meter. Then we have to use it.

Q. You have to figure area? A. We have to figure area, the displacement of mercury.

Q. What do you mean? Length times width? A. Right, Clem, and the volume, how much we put in. We have to figure linkages out so we get the right angles.

Q. Would this airplane question here—when the engine is out of order, which way would the plane go—be an aeronautical principle that you would meet? A. I can take almost any of these and connect it with practically anything in life. Sure, I can take the airplane and say that we got a

relay or a Stantrol and say that the A or B chamber becomes out of balance, the same way one engine fails. I can connect it that way. I can probably connect it with something in the every day walk of life. One leg gives out. What the hell, it's the same as the engine.

[478] Q. How about number 12: If the bolt is screwed in a certain direction, which way will it move? A. You mean the right-hand or left-hand thread?

Q. Right-hand or left-hand, yes. It isn't clockwise or anticlockwise. A. Most of my life I've been an instrument man, and if I was just new, I don't know whether I would know a right-hand or a left-hand thread or not, but I would have to truthfully admit a vast amount of knowledge which I have in mechanics I've picked up in on-the-job training in 25 years as an instrument man.

Q. I see. And it is obvious to you when get a right-hand and a left-hand thread because of that on-the-job training over the years, right? A. Yes.

Q. How about number 6? Which man must pull in more rope to raise the box? Do you ever get into lifting with cranes or with derricks and so forth in connection—— A. Not in this relationship here with pulleys or three pulleys compared to two pulleys. We do get into lifting stuff with what we call a come-along.

Q. What is that? A. It's just a hook with a ratchet, Clem. It's a newer type thing they use in place of come-alongs now. We do lift [479] things with lift fork truck, which has nothing to do with this. But we do not rig up any block and tackle.

Q. Does the boat in number 4 enunciate any principle to you that you would have to use as an instrument man? If the canoe is moving forward, which way will it go when the front man holds his paddle in the water in the position shown? Does that enunciate any concept to you at all that you would use in instrument repair work? A. Yes, I can picture many places where I could connect it to. Flow of water through a pipe, steam through a pipe. If there is a

curve in the pipe or if there is an object in the pipe that affects the flow, it would take more exertion. There are numbers of cases I can connect with that.

Q. There is a picture here in number 10 showing you a cold day and a warm room and the wind coming into A and going out at B and they want to know which way will the air move. Does that mean anything to instrument men? A. I would have to admit it does, yes.

Q. In what way? A. Well, a lot of our job is based on laws of physics, and I would check that with the law of physics.

Q. How about the paper form board? Did you get a look at some of those? A. I looked at the first page, Clem.

[480] Do you remember when the psychologist was up at the blackboard telling you how to fit squares together and forms together? A. Yes.

Q. Is this a principle in instrument repair work do you think? A. I myself couldn't connect it to my work, no.

Q. You never have the chance to use that? A. No. Maybe a sheet metal worker could use it. I sure as heck couldn't.

Q. Do you get into any of these—you probably haven't had a chance to see any of them—mathematical reasoning questions? They look like small pieces of algebra. Do you get into algebra at all? A. Clem, I haven't for quite sometime. There was a time first starting out like we had to figure how many inches of water is related to how many inches of mercury and we would do that, but as the years go on, I guess I just take it for granted now I know what the ratio is.

Q. Do you have books that give you the answer? A. Oh, yes.

Q. For example, square roots and cube roots? You look up the number? A. Yes.

Q. You don't have to calculate anything like I do? A. No, not any more. It used to be that we had to. Like if we [481] were changing a meter, like I said, from a 120 inch to a 50 inch meter, then we had to know the square root to see

where 10 percent of the chart would be, where 80 percent would be, and we had to figure out the square root to get this.

Q. You figured it out or you went to a table? A. No, that time we figured it out. Now we have books that show us what the square root is.

Q. And the cube root, if you use it? Do you ever use it? A. No. Oh, on occasion we have on the coal pile, but that's been years back. We don't do that any more.

Q. And do you use angles, sines and cosines of angles? A. Yes, I would say we do, Clem, when we're adjusting linkages on certain type meters. Some meters have as many as eight, ten, twelve linkages, and then we get into angles.

Q. And do you have tables that you can refer to generally on angles? A. No. It's hit and miss.

Q. You mean you estimate it? A. Estimate.

Q. I see. A. On some particular instruments we know one angle has got to be horizontal where the next one has got to be at roughly 30 percent, so we don't get a protractor and measure it. We estimate what 30 degrees is and set it up that way, and [482] we run calibrations to make sure we're right.

Q. Now, these little arithmetic questions. If two apples cost a dime, how much will three apples cost? Obviously they cost a nickel apiece. Do you get into any of these little trick questions? A. We do some math on a lot of our test procedures.

Q. What? Multiplication? A. Multiplication.

Q. Addition? A. Addition, division.

Q. Subtraction? A. Subtraction.

Q. But do you ever do any trigonometry? A. No, I never have.

Q. Or geometry? A. No.

Q. Are most of the men capable in trigonometry and geometry, in your opinion, or wouldn't you know? A. I can only relate back to one of the qualifications on the job when I bid on it. I had to have two years of math, a year

of chemistry and a year of physics when I bid on the job back in 1947.

Q. Did you need to be a high school graduate? A. I believe so, Clem.

[483] Q. You don't need to any more, according to Mr. Schwab; is that right? A. That's right, because on the last four bids at St. Clair, the word "open" was behind age.

Q. Now, over the years you've seen a lot of instrument men undoubtedly in two plants at least, right? A. Yes.

Q. Has there been a rate of failure; that is, people who couldn't do it and you had to send them out? A. I've never seen that.

Q. In other words, what have you witnessed over the years? People of average intelligence come into the job and they learn it? Is that about it? A. Yes. We never had anybody that outshone the other man. We did have a man at St. Clair that left St. Clair, went to Enrico Fermi, came back as an engineering technician and he is due to graduate from St. Clair Community College next Sunday.

Q. What kind of job? A. Engineering technician.

MR. LEWIS. Do we have the instrument repairman job description in the exhibits?

MR. HOUGHTON. I believe it is Joint Exhibit 10.

Q. (By Mr. Lewis) This is the instrument man job description [484] and these are the typical duties. Are you familiar with it? Have you seen it many times? A. Is this at Monroe? Yes, because we are getting ready to go into a job evaluation. I've read this one over.

Q. Does it vary or differ at all from the others that you have had in St. Clair and Trenton and so forth? A. Oh, there are some differences, Clem, but I would call them minute. Let's see if I can point one out for you.

Under typical duty number 5, solid state. I do not believe—I'm almost positive we do not have that wording in our job at St. Clair.

Q. Do you have any solid state equipment? A. Oh boy, you better believe it!

Q. In St. Clair? A. Yes. We've got a room twice the size of this full of it.

Q. Do you know if some of the other plants have solid state? A. Trenton Channel. I've been there since No. 9 went into effect and they have basically the same unit that we have.

Q. Solid state? A. Solid state. I've been to Monroe on occasions. I've gone with the chairmen there looking over their control room, comparing it to ours at St. Clair, and they have more than we do because they have four units that are electronic controlled. They are bigger units. Maybe they've got six [485] times as much as we have.

Q. Yes, but Mr. Locke said that was more of same. Is that right? A. Right.

Q. Not more of something different? A. No.

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[488] ROGER SPRAYBERRY

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q. What is your name? A. Roger Sprayberry.

Q. For whom do you work? A. Detroit Edison Company.

Q. What is your occupation? A. Instrument repairman A.

Q. Which plant? A. Monroe Power Plant.

Q. Do you have a union job also? A. Yes. I'm also the union chairman of the Monroe Division.

Q. How did you start with the company, Mr. Sprayberry? Bring us up to date if you don't mind. I'll put it all in one question. A. In October 1963 I started as an operator at Conners Creek Power Plant. I was hired as a C operator, they called them at that time. Then I went into

the B operator program, and bid out of the operating group into the instrument shop at the end of 1966. I actually entered the shop in January '67 at Conners Creek. I was at Conners Creek until the end of '69.

[489] January 5 of 1970 is when the job started at Monroe Power Plant with an interlude of two weeks when we were sent to a vendor's school, and the vendor was Bailey Meter Company. They are the prime group down there with the control system at Monroe.

Q. Now, were you given a test when you became an instrument man? A. I was given a test, and up until this arbitration started, I thought I was given the instrument test battery, but as of last Thursday, I believe, I'm not so sure now which test I took.

Q. Well, let's see what you did. Do you remember taking the Minnesota Paper Form Board, that jig saw puzzle sort of thing? A. I believe I took that when I hired with the company in the operating department.

Q. But not as an instrument man? A. I believe that once I had taken that, I didn't have to retake it. You will have to ask Testing. I'm not sure. I don't think I retook it.

Q. Did you take this vocabulary test? A. Yes, there was a vocabulary test.

Q. And is that relevant to the instrument man job, in your opinion?

[490] MR. LEWIS: Same objection.

THE ARBITRATOR: I understand your objection.

THE WITNESS: I feel anybody who really went to high school who has basic reading skills can read any instructions that we have to read as far as instrument repair work.

Q. (By Mr. Lewis) Is it about the same as a newspaper or magazine? A. Yes, I believe it is. There are some technical words that you come across, but those you pick up, I think, in every day experience. You see it once and from then on you know what it is.

Q. You may have to get help from time to time? A. The first time. The way I was trained, I was not sent to school and I did not take this DuPont course. I was like Fred Malone, only much newer. I was given on-the-job training in the Conners Creek instrument shop. When I bid on the job, I believe I was the first new man in the instrument shop in either 10 or 14 years, and I learned from the people who had been doing the work over the years.

Q. Say that again. You say there weren't any drop-outs in the Conners Creek instruments shop for 12 years? A. Right. And finally a man died and that's when I went into the instrument shop.

[491] Q. How many men were in Conners Creek? Do you know? A. I believe eight or nine.

Q. How many are in Monroe? Well, I think Mr. Locke said there are 12 now. Is that right? A. Right.

Q. Now, do you use some of the principles enunciated in this mechanical comprehension test, do you know? Do you ever figure the areas and volumes of squares and cubes and cylinders? A. Right. I would like to tell you one thing on these. You use the basic principle but you don't have to figure them any more. I think that's a change from the old instrument group to the new. For almost anything we do now there is a table.

I mean if you want to know the square of something or an area, unless you are starting to figure a whole system, you can just look in a book and it will tell you.

If you want to calibrate a flow meter of so many inches, it will tell you how many inches of water equal that many inches of mercury and you go from there. They have cross references on just about all meter work we do.

Q. You seldom have to calculate anything by hand? A. No, not really. Like Fred said, I agree you do have to [492] on angles setting linkages, but there again you do that by sight. I mean after you've done it a couple of times, I guess

you could say you estimate it. You certainly don't figure out angles like that any more.

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[495] Q. Now, did you say you used in any way the form board test—I call it the jig saw type of thing—in your work at all? A. Unless the company relates that to figuring out putting linkages and parts back together on any instrument after you remove them, that would be the only thing where I could see you would use that.

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[498] Q. I'm glad you brought that up. Tell us about the electrical certificate. Is that a requirement for this job ultimately? A. This is a requirement for an A instrument man. It is not a requirement for B instrument man. Now, a lot of people got their electrical certificate before they ever bid into the instrument group. I, for one, started it when I was an operator. I actually finished it when I was already in the instrument shop.

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[501] Q. Let's take the new fellows that were successful in the Monroe Plant in this case that we are talking about. Did they immediately get assigned to people like you to learn how to do things? A. You would have to check with management to make sure, but it seems to me for the period of one week they were all given orientation, you know, to learn just the plant, the layout, walk around. They were with an engineer, I believe, to kind of break them into the way things are done at Monroe and where things are located.

And then after that when they were put in the shop on a steady basis, they started out, yes by working [502] with one of us A instrument men. I would say there was only one the day they came in or the week they came that could do anything alone, and that would be Dave Elliott because he was already a B instrument man.

Q. You mentioned that they went around with an engineer to learn the location of various instruments. A. I'm not really sure it was to learn the location of instruments. I believe it was just to orient themselves with the plant. We were in a construction period. I believe when they came, No. 1 unit was running and No. 2 was about ready to go on. The whole other half of the plant was in some phase or another of construction. Maybe just the steel work up on 4. It was just to familiarize them with the plant. I don't think you can call it as such, training.

Q. Would a man selected from the plant have an advantage over somebody selected from the outside, as to knowing where things are, at least? A. I feel he definitely would. I mean, to be an operator at Monroe he would at least have to know where everything in the plant is, and especially the things that interest him as far as his job as an operator, depending if he was an APPO or PPO. That defines which areas they would be working in.

A fuel handler—which some bid on the job—[503] would have to know the fuel handling system, plus they also work in the power plant in the control room on running fuel, conveyor belt from the coal pile into the plant, plus up on various floors of the plant where the conveyors are located, so they would at least have to know the locations of equipment in the plant.

Q. And a stranger coming in from outside would take weeks to learn all of this stuff, right? A. Just to find out where things are, yes.

Q. Do you have any idea why all of the men who bid from Monroe Plant were rejected, in your opinion? A. To my knowledge, the only answer I ever received was because of test scores. They did not score the required "recommended" score.

Q. Are you familiar with the work that some of these six men who were bypassed did? A. Before they came to Monroe?

Q. No. While they were at Monroe, while they were bidding. A. Oh, the six that did not get the job, you mean?

Q. Yes, or the eight, whatever it was. A. If you tell me the names, I'll tell you which ones did what.

Q. Are you familiar with what Chinavare did? A. Yes. Chinavare was a utility man, which I believe we are the only one in the system who have utility men. I would [504] think it would be a very good job for breaking into a plant. He works directly with mechanics, also with the instrument shop, and also with power plant operators and assistants. They are used on any jobs in the plant to supplement the people working in the plant.

For instance, I have personally had one working with me for over a week on one instrument system on a boiler.

Q. How about Mr. Girrbach? A. Girrbach was a fuel handler from the fuel handling system.

Q. Did he have any familiarity with instruments? Did he know where they were and everything? A. He is an operator. They have handlers, operators and inspectors in the fuel handling group. He is an operator, so he would at least have a lot of experience reading and having to do with instruments for the fuel handling system; level indicators, voltage indicators.

Q. Is Mr. Andrews the one who was finaled? A. Right.

Q. So we won't talk about him, although that's a matter of grievance, isn't it? A. Yes.

Q. So his case is being protested? A. Right.

[505] Q. What about Mr. Wiley? Was he a good candidate, in your opinion, for the instrument shop? A. I think he would be because he scored an "acceptable" on the test.

Q. Some years before? A. Right. But besides that, he's been at Monroe, I believe, a little over two years. He now works in the tool crib and warehouse group. He came from Trenton Channel Power Plant and I do not know what his job was at Trenton, but he's been a good employee at Monroe.

Q. What about Mr. Foster? A. Foster is in the fuel handling department, also an operator, so I would think he would have the same qualifications as Girrbach.

Q. And Mr. Burger? A. With Burger, I believe the sequence of events with him, he came to Monroe fuel handling just to get to the fuel handling department so he would be in line for a Monroe Power Plant bid. There again the bidding system for Monroe operating group always starts at Monroe. People in the fuel handling group or instrument group or warehouse group would have first shot at a Monroe job before someone else.

So I believe he came into the fuel handling group, bided his time there, and then when an opening did [506] open up in the operating group, he bid into that group and that's where he is at this time. He is a Monroe Power Plant operator.

Q. He is a power plant operator? A. We could check with Ray to be sure, but I'm sure he is a power plant operator.

Q. When he bid for the instrument job, he wasn't a PPO, was he, or was he? Or don't you know? A. I can't say for sure.

Q. How about Mr. Ponozzo? A. Ponozzo comes under the same heading as Jim Chinavara. He was a plant utility man hired off the street for the Monroe Power Plant job. He did not come from another power plant.

Q. Was he familiar with instrumentation and things like that around the plant? A. Mark Ponozzo is the one that I worked with for one week on one group of instruments on a boiler.

Q. He was your helper? A. Right.

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Q. How about Mr. Longton? Are you familiar with Longton? A. Yes, Gary Longton is presently working in our tool crib and [507] warehouse group, and to go back before that, he was also a plant utility man at Monroe Plant.

Before that I believe it was T & B, the contracting company he worked for, which is one of the major contractors at the Monroe Plant site.

Q. What kind of contracting? A. Well, they do a lot of things, steel work and——

Q. Building construction? A. Building contractor for the Monroe Power Plant. And then after that he quit there and hired in with Edison itself when the Edison people took over at Monroe Power Plant, and he started out in the utility man group and then finally ended up in the warehouse group, and the reason he went in there was at this time they were talking of this merger with PSG going into Maintenance.

Q. PSG meaning plant service group? A. The plant service group going into the Maintenance Department, which would mean they would no longer be able to bid on jobs at Monroe, as a Production Department employee would be able to do. So Gary wanted to stay in the Production Department group so he could bid into this job.

I'm not sure of the experience he's had. I believe his father owns Downriver Television Repair.

Q. Television repair? [507] A. I believe that's the name.

Q. That's electronics. A. That type of work, and he also has some college.

Q. Some college. How about Michael Pratt? A. Pratt is an operator and, if I'm correct, he's the senior PPO in Monroe Power Plant or close to it. He's up near the top of that range.

Q. And he's familiar with instruments, I take it? A. He's been there——

Q. Since it opened? A. Not since it opened. He was, I think, within the second group of operators that came down.

Q. Those are the men who were denied the job, right? A. Yes.

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[513] JAMES CHINAVARE

being first duly sworn, was examined and testified as follows:

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[515] What is your job at Monroe Power Plant? A. Plant utility man.

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[518] Q. I see. But then when you bid for the instrument job, you got this test battery; is that correct? A. Yes.

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[519] Q. I see. Now, did you find the test related to instrument work, in your opinion? A. Not really.

Q. For example, do you remember the Minnesota Paper Form Board test, that jig saw puzzle sort of thing? A. Yes.

Q. Do you think that is related? A. Not to me it isn't. Maybe to management it is.

Q. How about the cross word puzzle thing I was talking about? Are you familiar with the vocabulary thing? A. Yes.

Q. Did you think that was related? A. No.

Q. How about the mechanical comprehension? Did you think some of that was related? [520] A. That could have been.

Q. How about the arithmetic and algebra and so forth? A. Some areas, yes.

Q. You should know how to add and subtract and divide and so forth? A. Yes.

Q. Are you fairly good at arithmetic? A. Yes, I'm average.

Q. You had no trouble in school on that subject? A. No.

Q. You are not familiar with the men who did get the job. They came from outside; is that right? A. Yes.

Q. So you wouldn't know their qualifications as against yours, would you? A. No.

Q. In your opinion could you do the job if it was given to you? A. Yes.

Q. You are sure of it? A. Yes.

Q. Do you fix gadgets a lot at home and for neighbors or anything like this? A. Yes.

Q. You do? Are you handy with tools? [521] A. Yes.

Q. Fix your own cars? A. Yes.

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[522] GARY LONGTON

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q. Your name is Gary Longton? A. Yes, sir.

Q. When did you first hire into the Edison Company? A. March 1st of 1971.

Q. Where did you hire in? A. At Monroe Power Plant.

Q. You hired in directly to Monroe? [523] A. Yes, sir.

Q. What was your occupation? A. I was hired in as a plant utility man.

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[527] Q. Did you take the test battery for instrument repair? A. Yes, I did, sir.

Q. Were you surprised you didn't pass? A. Yes.

Q. Did you ever take any other test with the Edison Company? A. When I hired in, I took their preliminary batteries or whatever they call it when you hire in.

Q. New employee? A. Right.

Q. Did you find the test related to instrument man work? A. In my opinion, I couldn't really see where it did.

Q. Can you remember any specifics that you thought were irrelevant? [528] A. It all seemed very general and I can't really think of any specifics.

Q. Well, do you remember the Minnesota Paper Form Board test, which is sort of a jigsaw puzzle thing? A. Right, sir.

Q. Did you regard that as relevant? A. Really towards the instrument job itself, I couldn't.

Q. How about the vocabulary test, like the cross word puzzle? A. It kind of threw me as to being relevant, but I could see where you might need to see new words and try to figure them out as you're going along in a new job.

Q. You will agree you should know how to normally read, write and speak English, of course. A. Yes.

Q. And how about the mechanical comprehension sections of it? A. I would say it had some relevancy.

Q. How about the algebra and the mathematics? A. The mathematics, yes. Algebra, to the extent that I went into it, I didn't see where the harder problems would be used on the job, talking to other instrument men.

Q. You've got to know how to add, subtract and divide. There's no question about that, right? A. Right.

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[558]

Respondent's Exhibit No. 10

JAMES GODA

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q. For whom do you work, Mr. Goda? A. The Detroit Edison Company.

Q. At what location do you work? A. Monroe Power Plant.

What is your occupation? A. I'm a fuel supply mobile equipment operator.

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[562] Q. Did you take a test for the instrument man job? A. Oh, for the instrument? Yes, I did.

Q. Do you want to change your answer, that previous one? A. Yes. I thought you said before the instrument.

[563] Q. No. Now, do you remember getting tests such as these, word tests, vocabulary tests, or don't you? A. Yes, I do.

Q. Did you find those connected with or relevant to the instrument job? A. No, I did not.

Q. You did not. Do you remember getting some arithmetic tests? A. Yes.

Q. Did you have some arithmetic in school? A. Yes, I did.

Q. Throughout high school? A. Yes.

Q. Did you have a little science too? A. Yes, I did.

Q. Did you find the arithmetic related to the instrument man job? A. No, I didn't.

Q. Why do you say that? You never see the instrument men doing any of these word things or arithmetic? Is that why you say it? A. That's right.

Q. I see. Do you remember these mechanical comprehension questions? A. Yes.

Q. Did you find those related or unrelated or what to the [564] instrument man job? A. I found them unrelated.

Q. Why? A. Because they didn't have anything to do with the instruments.

Q. One more question on these tests and then I want to ask you a general question. Do you remember getting this sort of jigsaw puzzle thing called the form board test? A. Yes, I do.

Q. Did you find that related or not to the instrument man job? A. It could possibly be related to putting instruments together but——

Q. You mean piecing things together? A. Yes, piecing things together.

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[567] MARK PONOZZO

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q. Your name is Mark Ponozzo? A. Yes, sir.

Q. Who do you work for, Mark? A. Detroit Edison Company.

Q. When were you first employed by Detroit Edison? A. February 8, 1971.

Q. What was your hiring-in job, Mark? A. Plant utility man.

MR. LEWIS: Is the plant utility man job description in evidence?

THE ARBITRATOR: Yes, I'm sure it is. It is Union Exhibit Number 14.

MR. LEWIS: Thank you, sir.

Q. (By Mr. Lewis) What is your occupation now, Mark? A. I'm still a plant utility man, sir.

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[574] Q. Do you remember taking a test for the instrument man job? A. Yes, sir, I do.

Q. Do you remember some of the parts of the test? A. Yes, sir, vaguely.

Q. Do you remember the vocabulary side of it, like a cross word puzzle test? A. Yes.

Q. Relating one word to another? A. Yes, sir.

Q. Did you feel this was relevant to the instrument man job? A. I don't want to sound facetious, but not really. I never thought it was relevant, no.

Q. That's all right. You're not sounding facetious. A. The only reason I say this, from what I can remember, the words just didn't seem to have any mechanical inclination or any technical inclination as far as I am concerned.

Q. How about the arithmetic side of it? Do you remember taking an arithmetic test? A. Yes, sir.

Q. And was that relevant, in your opinion? A. Well, I'm sure that math does play a part in the instrument man's job, sir, but that's quite elementary there.

Q. You mean addition, subtraction and multiplication? [575] A. I'd say that would be quite elementary. Like I say, I don't remember everything that was on the test.

Q. You wouldn't have any trouble with anything like that, would you? A. I would hope not, sir.

Q. You studied quite a bit of arithmetic, I take it? A. Well, in high school. I never had any college math, but if I couldn't do that, sir, I'd be quite embarrassed.

Q. Do you remember the mechanical comprehension parts of the test? A. Yes, sir.

Q. Did you find those to be trick questions or did you find them to be solid principles? A. Well, I've taken a a lot of tests, and with the time allotted, it is a time-consuming thing and it does take thought. It's not something that you can—I'm sure they're designed that you're not supposed to get them off the top of your head, and I don't say I'm the smartest person in the world, but they're very vague. I don't really see what relevancy it had, but, you know——

Q. You thought it was vague, knowing the instrument job the way you know it? Is that what you are saying? A. You know, fail to see the correlation between that and the instrument job.

[576] Q. That's exactly the question. You know the instrument job to some extent because you see it around the plant all the time; is that right? A. Yes.

Q. And you work with them once in awhile, right? A. Yes, sir.

Q. And you now are answering a question on correlation, and you don't—— A. I don't see any real comparison, no, sir.

Q. Do you remember what is called the Minnesota Paper Form Board Test, which is sort of a jig saw puzzle arrangement? A. Yes, sir.

Q. Is that relevant, in your opinion, to the instrument man job? A. Well, putting things together, you know, mechanically, basically.

Q. To the extent that you put things together here or in an instrument, you assemble. Is that the point you want to make? A. That's true, sir.

Q. It's got an assembly connotation? Is that the way to put it? A. Yes, sir.

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[580] BILLY WRIGHT

being first duly sworn, was examined and testified as follows:

[581] DIRECT EXAMINATION

BY MR. LEWIS:

Q. You have given your name to the reporter, Mr. Wright? A. Yes, I have.

Q. For whom do you work? A. Detroit Edison.

Q. What is your occupation? A. Instrument man A.

Q. Which plant do you work in, sir? A. Monroe Power Plant.

Q. When did you hire into Detroit Edison Company? A. In May of 1968.

Q. At which location did you hire in? A. At the industrial plants.

Q. Which one was that? A. Well, Wyandotte North.

Q. You hired into Wyandotte Plant? A. That is correct.

Q. How long did you stay there? A year? A. No. I didn't come down to Monroe until January of '71.

Q. Three years? A. Approximately.

Q. What was your hiring-in job, sir? A. Instrument man A, T-15.

[582] Q. At Wyandotte? A. Yes.

Q. You were hired in directly as an instrument man A? A. That is correct.

Q. What was your previous trade before you came to Edison? A. Instrument man.

Q. Where did you work? A. Scott Paper.

Q. Were you given any tests when you went to work at Wyandotte? A. Yes, I was.

Q. Were they something similar to this battery test? A. Yes, they were.

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[587] Q. I'm sure you are an expert on instrument work. Give us your opinion as to the relevance of the vocabulary test that was given here for the instrument job. A. Well, I'm not sure that's the one that was given.

Q. No. It's the system I'm talking about. I refer to it more or less facetiously as a cross word puzzle but really that's the way I look at it, because when I do the cross word puzzle, that's exactly what I try to do, figure out which word matches the other. A. Well, I'd say you should know the shadings and different meanings of words. It may well be an important test. I don't know. I'm not really able to tell.

Q. Yes. I wouldn't totally disregard it either. But does it mean a man should be fairly literate? Is that the word to use? [588] A. Yes.

Q. He's got to be able to read books, read papers, read catalogs? Is that the answer? A. Correct.

Q. But that doesn't mean he has to have a master's degree in the English language, does it? A. I wouldn't think so.

Q. Now, the arithmetic. As an expert instrument man how much arithmetic do you do? A. As I say, not as much here as I have, say, at Scott Paper. Normally when we went into a problem, the CV of a valve or something of that nature, we don't normally go through that. We turn it over to the engineers. However, in calculating—

Q. You used "CV".

MR. HOUGHTON. Excuse me. I don't think he was finished.

MR. LEWIS. I want to get that correctly.

THE WITNESS: The flow coefficients of a valve. However, in calibration work it's necessary to figure proportions to inches of water gallonage and flow and so forth. Good grocery store mathematics is very important there.

Q. (By Mr. Lewis) Grocery store mathematics? A. Well, figuring proportions, things of that nature.

Q. But do you have tables for certain things? [589] A. you can use a slide rule.

Q. Slide rule? A. Yes.

Q. Do you get into any trigonometry or geometry or anything like that? A. Not to a major extent at the present time, no. It's good to know, but I would say it would not really be essential to the job, no.

Q. You've got to be able to add? A. Yes.

Q. Subtract and multiply; is that correct? A. Yes.

Q. And you've got to be able to either read the slide rule or a square root or figure it out? A. That's right. The formulation is important in instrument work. Don't get me wrong. It really is.

Q. Right. But again are we talking about high school mathematics or college mathematics or what are we talking about? A. It depends how far they want the instrument man to progress in his trade. I mean he could go right up to

calculus, actually, to figure out the whole system yourself.

Q. But you are not required to? A. Not here, no.

Q. Now, the mechanical comprehension. Did you hear the [590] testimony about this portion of the EPSAT Test while you were here? A. Yes.

Q. What is your view on the principles enunciated in these questions and problems? A. Well, I think it's a learning thing. We're looking at physical ways of doing things and it would help if you did well, I think, on this test, yes.

Q. You mean the instruments themselves are shaped peculiarly? Is that what you are saying? A. No. The drive mechanisms are rather—you don't run into them ordinarily.

Q. The make-up or the architecture of the instrument is the unusual thing? A. No. The actual mechanical driven forces and how it is transmitted back and forth is unusual.

Q. How about the Minnesota Paper Form Board Test? How does that strike you as being relevant? I call it a jigsaw puzzle, but again I'm being facetious on this. A. I really don't know about that.

Q. That you don't know? A. I really have no estimate. I just can't estimate what—

Q. What that means? A. What that means, no.

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[616] REBUTTAL

LAWRENCE E. KANOUS

called as a witness in rebuttal was examined and testified as follows:

* * *

[617] Q. I believe we covered this earlier but I wanted to make sure. In view of the testimony that has been introduced, it is obvious that The Detroit Edison Company has developed test [618] batteries utilized for certain specific trade jobs and in other jobs it has not. What determination or consideration is given as to whether or not you are going

to use tests for entrance into certain jobs such as the instrument man job? A. In the first place, if you are going to use tests for particular jobs, they have to be validated, and we don't just capriciously bring up tests wherever they are and then start to apply them. The basis upon which tests become validated for specific jobs has to do with the kinds of things that I think I mentioned earlier.

Number one, those jobs that are critical to the company's business, whether they be critical in a technical sense, customer relations sense or whatever. That is one factor which would get a job considered for the development of validated test batteries.

The second one has to do with whether there is an aspect of employee safety or equipment safety involved in the job. Where that is a serious consideration, that gets high priority as well.

Then lastly, to be realistic, in order to be able to begin a validation study, you have to have the time, the personnel to carry it off, complete the work; you have to have the money to do it. You have to have the cooperation of the people. In the case of instrument men you have to [619] have the cooperation of the instrument men, instrument foremen, technical engineers and others in order to be able to pursue the study and be able to accomplish it.

I think those are the three factors which go to determine which jobs we were able to develop validated test batteries for. There are others that we haven't been able to get to or which don't have the same considerations at as high a level.

Q. I suppose some of these validation studies may take literally months of time. It's not something you do over-

night. A. The power plant operator battery took more than seven years.

Q. For example, the instrument man job, were there considerations of safety involved in that job at all, importance to equipment? A. Yes.

Q. How so? A. Well, as I think has been testified to here by the men doing the job and others of us that know the job, that job is of critical importance to the operation of the plant. If those jobs are not adequately performed, obviously the plant can't run.

Further, I think that there are some safety implications that relate to the instrument man's work. He can create situations which are extraordinarily [620] hazardous to other employees or the equipment that he's working on.

Q. Would I also be correct in saying, Mr. Kanous, that there are jobs that are quite important in the company, other journeyman type jobs, that we don't have test batteries for? A. That is correct.

Q. Merely because we don't have a test battery doesn't mean a job isn't important or vice versa? A. That is correct.

Q. There have been some allusions to a concept of retesting in some of these aptitude areas. There has been no evidence, at least that I am aware of, that any of these gentlemen requested retesting in this case, but is there a situation or are there circumstances under which you do retest people? A. There are.

Q. Particularly how would that work with respect to the instrument man job? A. Well, it would work with respect to the instrument man job the same as it would in any other situation where retests are concerned. We are specifically concerned that we have a good test, that the test be a fair measure of the employee's performance on whatever the test is and if in an individual case there are extenuating circumstances that lead us to believe that we might

not have good information, then retest [621] is appropriate, each case being considered on its merits.

Another case would be that in some cases where we use tests which measure proficiency as contrasted with aptitudes, we have some reason to believe that the employee has in fact done something to increase his proficiency in that area. He would be retested. Usually some specific period of time is required between the first taking of the test and the second taking of the test in most instances.

Q. Now, with respect to the testing program as such, you told us earlier that the Edison Company conducted a validation study and you reviewed that study for us in some detail. I have here a document that purports to be that study that I would like to introduce into evidence, and I will ask you if this is the validation study you have been testifying about. This is the one, I believe, that Mr. Roskind ultimately developed which led to the tests that were used in this case. A. Yes, this is the revalidation study.

MR. HOUGHTON: We would offer that as Company Exhibit 11.

(Company Exhibit 11 marked for identification)

MR. LEWIS: Well, if you are waiting for me to say yes or no as to the admission of this, I really don't know. [622] It's a lot of document to throw at me at this late hour.

MR. HOUGHTON: I would just indicate for the record we are not throwing it at Mr. Lewis at this late hour. This was provided to him and Mr. Johnson many weeks ago. It is the same document you have had for weeks.

THE ARBITRATOR: I believe it is pertinent to the case, Mr. Lewis. I don't know what weight it has, but I think it is pertinent. Therefore, I believe it should be accepted into evidence.

MR. LEWIS: Okay. Within the recognition that I can't examine all the contents too quickly, we can accept it, sure.

Q. (By Mr. Houghton) Mr. Kanous, with respect to the EPSAT Test, we had provided information to the Arbitrator and the union with respect to five of the six sections of the EPSAT Test and also with respect to the form board test. I have here a document that you gave me this morning that indicates samples of test items under the physical science comprehension section of the EPSAT Test, some 40 in number, which I will propose as Company Exhibit 12, and in doing so I will ask you if you can identify this and how this material was put together and why we didn't have it a little earlier. A. Yes. This is a set of questions, if you will, that I put together myself personally to be representative of the sorts [623] of items that are used in the EPSAT physical science comprehension section.

I make no claim for validity, reliability or anything else with respect to them. I did this on my own. There has been no test development research conducted on these at all.

Q. These then represent the range of the type of questions under that section? A. To the best of my judgment, yes.

Q. That is a series of statements as opposed to the other sections of the test we are familiar with. How does the test applicant work that test? Is it true or false? A. Yes. One of the exhibits, I think, shows the directions on a couple of sample items and indicates how one responds to this test. They are true and false. The applicant simply marks "T" and "F". That was one of the reasons why we could not find a sample test that, if I may use the term, exists in the public domain for this particular part of the EPSAT. This test having been built roughly 20 years ago, test makers these days do not usually use the true-false format, so we had great difficulty finding in the public domain in documents that one could purchase from the book store

or library things that really make this kind of a demonstration, so I had to build some myself.

[624] Q. You put that together last night and this morning? A. That is correct.

MR. HOUGHTON: We would offer it.

(Company Exhibit 12 marked for identification)

MR. LEWIS: Within the recognition that it is within the purview of what the company thinks the physical science comprehension section ought to be, it's all right with us. We are going to respond to it.

THE ARBITRATOR: All right. Company Exhibit 12 will be received into evidence.

Q. (By Mr. Houghton) Mr. Kanous, I would like to return briefly to the vocabulary section of the EPSAT Test which was under some discussion earlier in the case by several of the witnesses who examined the sample questions and evidenced concern apparently over whether or not those sample questions had any face validity.

Questions were raised as to really what you are seeking to test under that section of the examination. Are you seeking to test a man's knowledge of the English language or his linguistic ability, his aptitude or what? Can you explain that for us. A. We are seeking in that test to measure aptitude for linguistic kinds of things, the ability to develop the use of language, [625] the English language particularly, and not specifically to determine whether or not the applicant knows that word or not. We are really after the basic linguistic ability, which is an ability that is pretty well defined and has been used in many, many researches in many other predictive situations for pursuits which require high-level linguistic ability, the development thereof.

For example, in the academic world, there are a number of tests which are given to prospective college students which have two aspects to them, the quantitative ability and linguistic ability. ACE, ACT, PPSAT, the college entrance examination board test, many tests like this seek after the basic ability to learn to handle the language in a particular field. Really you are after the ability to use language rather than the language that is peculiar to the field in which the person is seeking to be trained or developed.

Q. So if I understand you then, in terms of levels of linguistic ability, you are saying certain trades, jobs, professions, whatever may require a certain level of linguistic ability and that is what you are seeking to measure? A. That is correct. And a person who exhibits, for example, high-level ability in this area, almost irrespective of the special pursuit—he might take law, he might take medicine, [626] he might take psychology, he might take whatever which has its own special language and so on; the test would be predictive of the ability to develop communication skills, verbal, written, in that language and the subtleties of the language.

Q. Is that true in the sense that you wouldn't, for example, be necessarily concerned with whether or not the person understood or knew the language of the profession at that point? A. That is correct. If a person had been successful, for example, in the physical sciences and had been able to develop the ability to communicate, read, talk about subtle nuances of the language for the physical sciences, I would fully expect that he would be able to develop similar talent in another field.

Q. The mixture of words that are actually used in the test then are designed to test this level of linguistic ability? A. That is correct.

Q. Recognizing that the man taking the test may not know all of the words? A. Correct.

Q. He may not have run across them? A. That is correct.

Q. Now, with respect to some of the learning that may be [627] involved in other job areas, I am interested in whether or not you had any experience along those lines, and particularly I am concerned with military type experience.

In the testimony there have been a couple of cases where men were involved with radar technician-type duties while in the military service, and I am wondering if you have run across that type of background and have an opinion as to whether or not that is indicative of success in certain job classifications or categories such as the instrument man. A. It may be, but not necessarily so. It may not be indicative of ability to perform at the level that is required of an instrument man.

I am the Director of Training for The Detroit Edison Company, and as such I try to keep track of what is going on, what sorts of things are being done with respect to selection and training in fields other than simply the utility area. I am also a reserve officer in the Air Force, and in that connection I've been assigned to the training research branch of the Aero Med Laboratory at Wright Field.

The military has a particular kind of a problem which relates to the fact that they have a great deal of turnover in all of their jobs, especially technical jobs, and as a consequence of the turnover that is involved at [628] great expense in the long-term training that has been required, the military has gone to a concept of designing equipment in the first instance such that skills, high-level abilities, long-term training are not as required as they might be under another design concept, and then they set up their organizations in such a way that the first level of maintenance, the field maintenance job, is in many instances

simply the removal of an intact module which can be identified as malfunctioning, and then based on whether or not it is a valuable piece of equipment—say some number, $600 worth, $500 worth; if it is less than that, they simply throw it away. If it is more than that, it is sent into a shop in which a different kind of a technician would in fact repair it, so that the field maintenance individual may in some instances be a parts replacement individual who uses special kind of test instrumentation which requires little or no interpretation of the instrumentation, simply good, marginal, not good; red, yellow, green, much like the tube tester that you would find in your local drug store to test tubes for your TV set. This is systematically done.

Now, if then an individual presents experience of that sort, that really doesn't tell you much about the sorts of things that he is able to do with respect to instrument work, for example.

[629] Q. In your opinion, would the test battery itself be a better predictor of those abilities? A. In my opinion, yes.

Q. With respect to the test itself and the scoring and cut-off point, there are just a couple of questions I wanted to run through you to make sure that we are clear, and one involves two concepts that we may have confused, predictability and validity. Would you distinguish those two for us, please. A. Validity simply talks to the point of whether or not a test is related to the performance of the job in question at some level. It tells you little or nothing about how well or how accurately you can predict within that. It is either valid or not at some point.

Now, in order to talk about the business of predictability you must do some additional work beyond the determination of sheer validity, and this is, for example, why the tests in the battery are a battery of tests and a weighted

battery of tests. This is such as to insure that as you attempt to make predictions from a man's battery score at some point on the scale, you have a reliable and reasonably valid prediction made.

Q. What you are looking for then is a test with validity and high predictability? [630] A. Accurate predictability.

Q. And are those criteria satisfied with respect to the instrument man B battery? A. I think they are, yes.

Q. Now, in scoring on the battery, we have established on the record, I believe, that the so-called cut-off point is 10.3. At one of the previous hearings the Arbitrator asked what is the upper limit and the lower limit in terms of total battery score, and you have provided me with information—correct me if I am wrong—that the upper limit for the battery score is 15.27 and the lower limit is 4.04. Is that correct? A. That is correct. This is the information I provided.

Q. Now I would like to run a couple of situations by you to make sure we understand how that scoring scheme works, and feel free to use the board if you want.

Assume that you have two batteries of tests or the same test, whatever. You have a cut-off point of 10.3. One of those tests has a top upper limit of 15, and say the other has a top upper limit of 500. What is the difference and how is that relevant to the selection process, if at all? A. Well, one of the problems that you have in testing is the fact that on one test the total number of items may be 25 and another one may have 500. You may have 500 items in the [631] test. Your problem is to be able to compare one test with another or to compare really the performance of an individual on both tests to determine if on both tests he is equally high or equally low or equally in the middle. That is a problem that is referred to as standardizing, or norming the test using a standard scale.

In The Detroit Edison Company we use a standard scale which has a mean of 10 and a standard deviation of 3, and

all tests are converted to that standard scale. If I can draw that on the board, it may be more helpful.

One finds if you study a lot of these tests that you have the range of scores on that axis from few items correct to many items correct. Then you plot on this axis the number of people who get that score. So we have number of persons.

When you do this, you find a distribution of scores that is typically found in many, many different processes, not only mental measurements, but other kinds of measurement. They tend to distribute themselves around a bell-shaped curve.

Now, if we have a test where the smallest number of items in all cases might be zero, and this might be 500, and you have another test where this is zero now and this is 25, one could make a considerable number of errors in placing [632] a person with respect to those two tests if you simply use raw scores, because perhaps in the case of the 25-item test, this point right here might be 20, and in the case of the 500-item test, this might be a number like 400. So if you said this individual got 400 on one test and 20 on the other, you might be misled into thinking he didn't do very well on the 20-item test.

So to solve that problem, persons involved in the development and utilization of testing have in fact created a scale where the arithmetic mean, the average, if you will, is some number, the average performance on the 500-item test, and the average on the 25-item test is called some specific number—and in the Edison Company's case it is called 10—and then you divide up the rest of the distribution in the area under the curve into segments and derive—this is then 7, 4, 1, 13. A score of 400 on your standardized scale would become 13, 16, 19. Then, of course, it never touches the base line in either direction.

So on the instrument test battery, the battery score is on this kind of a scale so that we can then compare the

performance of a person who takes that test battery with his similar performance on some other test battery and find out whether or not he is up here, in here, down there, where.

This is a very commonly used process. Most tests [633] like the ones I mentioned earlier, PSAT, army general classification tests, have this kind of a standard scale. Some scales are referred to as T-scales, but they are all standard scales.

Some have a mean of 100 and a standard deviation of 10. In our case we have a mean of 10 and a standard deviation of 3.

Q. Mr. Kanous, within the instrument man test battery the upper limit is 15.27. We have a cut-off point of 10.3. Assume hypothetically that upper limit were 100. Am I correct in saying, if I understand you, that the cut-off point well still might be 10.3? In other words, the cut-off point is not a function of the upper limit? A. That is correct. The cut-off point is an empirical demonstration of that point at which, according to the validation study, a group of individuals who are identified as being successful performers on the job is best discriminated from a group that are not successful performers on the job in its entirety. That is how the cutting score or critical score is determined. In some cases that score is quite a ways up the scale. In other cases it is quite a ways down the scale or maybe right in the middle. That is an empirical demonstration that arises from the validity study.

[634] In utilizing the results of this particular test battery within the company, as I understand it, the department is provided with information that indicates the man either received an "acceptable" or "not recommended"? A. "Acceptable" or "not recommended" on this battery currently.

Q. Assume hypothetically we have a man at 10, 11, 12, 13 and 14. For example, you do not give those five scores to the department, the department is looking for two men, and say the department would want to pick the men that were at 13 and 14. That practice, according to the testimony, isn't followed. Why? A. It is not followed and we do not provide those kinds of test scores to people making decisions in the department because if they have them, they have a very strong tendency in fact to utilize the test scores, you know, as you said, 12.5 against 11.5, and to do so would not be warranted from the data we have in the validation study. It would in fact be an arbitrary decision. Their cutting score might move anywhere as the case showed. That would not be appropriate. We do not give them those kinds of scores for that reason.

Q. The test would not support that type of analysis? A. No, it would not.

Q. You are saying then, I guess, that within the framework of the test, as far as predicting success of a man on the job, [635] you don't differentiate between the man that scores 14 and the man that scores 10.5 or whatever? A. No, we do not.

MR. HOUGHTON: I believe that's all I have.

CROSS EXAMINATION

BY MR. LEWIS:

Q. First let me get to a series of questions that has been bothering me all through this thing and I haven't had any answers at all on them. The EPSAT Test was divided into six parts; is that correct, Mr. Kanous? A. Yes.

Q. That's mathematics, right? A. Yes.

Q. You call it formulation; is that right? A. That is correct.

Q. Is vocabulary another word for it? A. No, it's not.

Q. I'm sorry. Verbal comprehension is vocabulary? A. That's right.

Q. Physical science, right? A. Yes.

Q. Arithmetic reasoning, right? A. That is correct.

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[636] Q. (By Mr. Lewis) Verbal comprehension. Is that right? Is that what you want to say? And mechanical comprehension. Have I given you six parts? A. In the validation study I think the parts are listed.

Q. This is in the record I'm talking about. A. Okay, whatever it is. I want to make sure that those are the terms. All right, I have it here.

Q. Six parts, right? A. Yes, six parts.

Q. These parts have different weights; is that right? A. No.

Q. They have equal weight? A. The EPSAT Test is scored as a total. The parts are not given differential weight.

Q. Tell me, does one right answer equal another right answer in a different section of the test? Do they all have the same value as far as the final grade is concerned? [637] A. I'm afraid I can't comment on that from memory. I can't comment on that because I think that each part of the test because of the nature of it—for example, in the test items which I have prepared which are true and false, the appropriate scoring formula for a true and false test would not be the same as one which has a multiple choice scoring formula, so I guess the answer, Mr. Lewis, is that they probably do not have equal weight, items from one part of the test to another part of the test. However, the score that enters into the battery is the total score on the EPSAT Test, not weighted parts.

Q. Let me add one more dimension. The Minnesota Paper Form Board test is another part, right? A. Yes, it is.

Q. Let me talk just theoretically and ignorantly. Do you get 5.2 for success on a Minnesota Paper Board Test and

5.2 for the EPSAT, making a 10.3 or 10.4 total? Is that the way you do it? A. They are added. The score achieved on the Minnesota Paper Form Board receives a particular weight——

Q. What is it? A. It may range from 3.6 to some other number.

Q. A maximum? A. I don't have the norms here. I can't give you that [638] information.

Q. Let me get back to what Mr. Houghton asked you. You said the best you could do in this battery is 15.27, right? A. That's right.

Q. How much of the 15.27 is represented in the Minnesota Paper Board Test? That's what I really want to know. A. I can't answer that question since I don't have a copy of the norm table here.

Q. How much of the 15.27 is represented by the mathematics in the EPSAT section? A. I can't answer that question.

Q. How much in the formulation? A. I can't answer that.

Q. The same answer would go if I kept asking you that? A. Yes, I would have to answer that in the same way to all the parts of the EPSAT Test. I don't have the norm table here.

Q. All right. Now, are you saying, Mr. Kanous, that Company Exhibit 12 is representative of the questions an apprentice or a beginner going into the instrument shop would or should know? A. This is the best I could do to create a set of test items which looked like those that are in the physical science comprehension portion of the test. This is the best job I could do both in terms of the kind of items that are here [639] and also in terms of the level of the items that are here, so I guess the answer to that then is affirmative, yes.

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[659] THE ARBITRATOR: I hesitate to do this but I'm going to anyway. My industrial psychology is many, many years

behind and so are my statistics, but as I have been sitting here, I have been trying to relate these things to 20 years ago and what has been going on in this case.

If you take a 10.3 cut-off score, what is the confidence level of that? What can you predict from it?

THE WITNESS: If I recall the statistics in the earlier validation study, not this current one—I did not work with this one—I think that the confidence level was something of the order of 85 to 15.

THE ARBITRATOR: So this would mean that 85 percent would succeed that got a 10.3 and 15 would not?

[660] THE WITNESS: Might not, yes.

THE ARBITRATOR: And by the same token then, 15 who got lower than that would have succeeded?

THE WITNESS: That is correct. That's my recollection of the earlier study.

THE ARBITRATOR: If you were to move that down to 10.0, you would increase the number who would——

THE WITNESS: Tend to fail.

THE ARBITRATOR: Tend to fail it?

THE WITNESS: Correct.

THE ARBITRATOR: That is the only question I have.

MR. LEWIS: I forgot this one. These questions on the physical science comprehension are true or false?

THE WITNESS: You answer them either true or false.

MR. LEWIS: If I were lucky, I might be able to get 10 or 12 of them correct just by luck, then, I take it?

THE WITNESS: That is correct.

MR. LEWIS: Thank you.

THE ARBITRATOR: I have one other question too that I forgot to ask.

Is it possible for a man to completely fail, as we would put it in a classroom, one section of the EPSAT and [661] still come out?

THE WITNESS: And still come out above the cutting score?

THE ARBITRATOR: Yes.

THE WITNESS: I believe it is, yes. That's the best of my knowledge right now. I would have to look at data. I don't think we've ever experienced that sort of thing.

THE ARBITRATOR: Or be completely low in one area and high in other areas?

THE WITNESS: I don't think we have seen that particular thing where a man would just completely, as the students say, bottom out.

THE ARBITRATOR: I have to deal with College Board scores quite often, particularly for Ph.D. candidates when you do have a verbal score and quantitative score, and if you are going into the quantitative areas, we would look more closely at the quantitative, probably, than at the verbal.

THE WITNESS: Right.

THE ARBITRATOR: But going into the social sciences, you might look more at the verbal than the quantitative.

THE WITNESS: That's kind of a sore point. You might do that, yes.

THE ARBITRATOR: I guess what I am wondering about in this kind of a test is when you grade these, you are just [662] just taking the raw score and not looking at what might be the elements in the test. Is that right?

THE WITNESS: No. We would look at the elements of the test. We always look at the parts of the test because sometimes a performance on a particular kind of segment of any test might indicate that we have a bad testing situation; this person really didn't have an opportunity to do what he is capable of doing, and you then can find out that, for example, a person's native language might not be English and that might account for the peculiar thing and you would then not even perhaps score the test.

THE ARBITRATOR: How would you see that? How would you find that data?

THE WITNESS: Well, you would see it because this particular test has, for example, several different elements tapping different kinds of abilities, some based on verbal use of language and some not so heavily weighted in that direction, and you would see a pronounced difference which is completely out of character. It just doesn't fit.

This is what normally happens when given the test. A test is an overall look at engineering and physical science aptitudes. That is a rather closely-knit set, and if one of the tests were way off, one might then legitimately ask whether or not you had a good test overall.

[663] THE ARBITRATOR: One final question: Suppose that an individual is informed that he has not received an "acceptable" or "recommended" score. Is he allowed to take the test again at his request or not? Do you give it only once? Did I understand you correctly?

THE WITNESS: No, it would not be given only once. If there was a reason why the individual thought he should be retested, those reasons would be examined, discussed, and then some period of time after he had taken the test the first time, he would then be permitted to take the test again. And it is the company practice that if there is a higher score, the higher of the two tests stands.

THE ARBITRATOR: If my memory serves me correctly, in this instance you had 31 people who took the test, and out of those, seven received "recommended" scores.

THE WITNESS: I don't have that information.

THE ARBITRATOR: The question I am asking is this: Suppose that none of the people had received a "recommended" score. What would happen then?

THE WITNESS: I think then Mr. Locke would have a decision to make as to whether he wanted to post company-wide against department-wide.

If that were to happen under the terms that we're discussing here, the posting is supposed to be done in a [664] plant, and finding no candidates to meet the requirements, those several that were listed, it would then be posted department-wide. Finding no candidates acceptable at that point, we would go company-wide. And finding no candidates at that point, we would go then to the outside.

Q. (By Mr. Lewis) A new door was opened, this privilege of retesting which the Arbitrator posed to you.

What would be the point of taking the test over again if the complement of jobs already has been filled? A. In my experience I've had many employees who took tests and in their own judgment there was a reason why they felt that they should retake the test, and on discussing that matter with me, I came to the same kind of a conclusion as they had that there was legitimate reason why they ought to retake it.

Q. What do you do with it? Suppose he gets 15.0? So what? A. Then that would be between me and the man, I guess. This is his new performance. We wouldn't tell him, "You got 15.0." We would tell him if he had improved in that regard, "You now scored in the 'acceptable' category."

Q. What would he do? File that in his bureau at home? A. I don't know what he might do. I have no idea what he might then do with that. He might rebid on another occasion. There might be other avenues open to him. I don't know what they might be.

[665] Q. Well, I mean assuming that all the instrument jobs are spoken for and the complement is filled, what would be the point? That's my question.

MR. HOUGHTON: Didn't he answer it this way, Clem? If a man retakes a test, it is company policy to allow the higher of the two scores to be used toward future openings.

Q. (By Mr. Lewis) If there is no attrition from a particular job, what difference does it make? There is not much attrition in these instrument shops, is there? A. No. That's one of the problems. We have relatively few. I think, on the other hand, there is another kind of thing that has happened to individuals on that basis.

Some individuals have taken a test battery like for the instrument job in which there is—once you get the job, there is a considerable amount of training and education which is required. Some individuals having failed to pass have given up the idea of pursuing that sort of thing at all, any kind of training on their own.

Others who didn't make a good score at the first occasion have said, "I'd like to try it over." And we look at their reasoning and we find out there is merit in giving them the test again and they have then continued to pursue education, training on their own or under the company's educational assistance program. They have [666] continued to pursue their aspirations in that direction on the basis of that kind of a retest or re-evaluation.

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[685] ROGER SPRAYBERRY

called as a witness in rebuttal was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS

Q. You have testified before, Mr. Sprayberry, haven't you? A. Yes.

Q. I want to show you what is marked as Company Exhibit 12. It is called "Test Items Similar to those Used in EPSAT Part III Physical Science Comprehension." Have you had a chance to look at that during the lunch hour and so forth? [686] A. I looked at it here in the room for a while, yes.

Q. In your opinion are those questions proper ones for an apprentice going into an instrument shop? A. My personal feelings are that a guy who has been in there awhile would be able to handle something like this much better than a new person. Before I went in the instrument shop I don't think I could have told you what a venturi was.

Q. When you went to the instrument shop, could you have answered all these? A. I don't think so.

Q. Do you think some of the grandfather incumbents could even answer some of these? A. I do not think that they could answer all of them correctly. You know, if you gave it to everyone who was an incumbent, I don't think they would all pass it.

Q. Of course you could get some of them by luck, couldn't you, yes and no, true and false? A. On true and false you can't get them all wrong, I wouldn't imagine.

Q. You would have to be unlucky, eh? A. Yes.

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[688] BILLY WRIGHT

called as a witness in rebuttal was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q. You have testified previously, Mr. Wright? A. Correct.

Q. I will show you what is known as Company Exhibit 12, and this is called "Test Items Similar to those Used in EPSAT Part III Physical Science Comprehension." Will you tell me if those subjects and questions are proper ones for an apprentice going into an instrument shop? A. I would hardly think so, no.

Q. Now, you are a real journeyman instrument man. You worked at instrument work even before you came to this company, right? A. Correct.

Q. Would some incumbents, even grandfathers, be baffled by some of these? A. I'd have trouble with the first one.

Q. You would have trouble yourself? A. Well, the question is: "The venturi measures pressure directly."

It's a flow measuring device. Yet you use pressure as a differential measurement on it. What kind of [689] answer do they want?

Q. You couldn't answer that? A. I wouldn't know what the question would be, really.

MR. LEWIS: Your witness.

MR. HOUGHTON: I suppose that is why you have to standardize the test and subject it to validity study to take out ambiguities like that.

THE WITNESS: I beg your pardon?

MR. HOUGHTON: That was a statement, not a question, I have no questions. Thank you.

(Witness excused)

MR. LEWIS: Mr. Malone.

FRED MALONE

called as a witness in rebuttal was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q. You have testified previously, haven't you, Mr. Malone? A. Yes.

Q. I'll show you what is marked Company 12. During the last hour or two have you had chance to look at this? A. I've glanced at it, yes.

Q. Do you think these are proper questions for an apprentice going into an instrument shop? [690] A. I'll have to agree with the other two witnesses that before I came into the instrument shop, I did not know what a venturi was. It was through my experience as an instrument man at the beginning rate that I found out what a venturi was.

Q. It doesn't only deal with venturis, though. It deals with stroboscopes and everything else. A. Number 14: "Anode in an electron tube . . ." Now, I didn't know anything about a tube at all until I helped build a Heathkit tube repair kit, and I got interested in this and I more or less made a study of my own about tubes and then I found out what this referred to. But at the time I came to the job, I wouldn't know anything about that.

Q. Does a fellow coming in the instrument shop for the first time know what a stroboscope is?

MR. HOUGHTON: How would he know that?

Q. (By Mr. Lewis) The average man? A. I would have to say that the average would not know.

Q. Well, in general do you think those are proper questions? A. I don't, no.

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Respondent's Exhibit No. 11

AMERICAN ARBITRATION ASSOCIATION

REOPENED HEARING

In the Matter of the Arbitration Between
THE DETROIT EDISON COMPANY

and

UTILITY WORKERS UNION OF AMERICA, Local 223

Grievance No. PMO-123

Case Number 5430 0720 72

Proceedings had and testimony taken before a Board of Arbitration (Dallas L. Jones, Chairman; Raymond W. Schleicher, Company Member, and Douglas McIlroy, Union Member) at the Howard Johnson Motor Inn, Michigan Avenue at Washington Boulevard, Detroit, Michigan, on Thursday, July 18, 1974, commencing at 9:30 a.m.

APPEARANCES:

RALPH H. HOUGHTON, JR., ESQ., Attorney, 1700 Guardian Building, Detroit, Michigan 48226
Appearing for the Company

CLEMENT J. LEWIS, Director of Services, UWUA-AFL-CIO, 815 16th Street, N.W., Washington, D.C. 20006

Appearing for the Union

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[3] THE ARBITRATOR: This is a proceeding under the rules of the American Arbitration Association. This hearing is also a continuation of American Arbitration Case 5430 0720 72, Grievance PMO-123.

The parties have agreed as to the issue which is to be presented at this hearing, at least as the Arbitrator understands it at this moment, and the issue to be arbitrated is

as follows: whether The Detroit Edison Company has properly implemented the award in accordance with the opinion attached thereto. And this, of course, refers to this Arbitrator's award in the above-mentioned grievance.

Am I correct in that, gentlemen? Is that the issue which will be presented?

MR. HOUGHTON: Yes.

MR. LEWIS: Yes, that's right.

THE ARBITRATOR: How do you wish to proceed?

MR. LEWIS: I want to ask a few preliminary or procedural questions and maybe answer them myself.

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[4] The third piece of unfinished business, as I see it, is this: I still have a charge against the employer pending at the National Labor Relations Board. I still want the tests. This case is apparently some kind of a hot potato. [5] It's been to Washington a few times for advice, they tell me, and back to the Detroit NLRB, and back to Washington and back to Detroit, and they were recently in touch with me and asked me if I would supply them with some more data and information, so I really don't know what is going to happen to my charge against the employer in which I seek actual disclosure of the tests, actual disclosure of each person's cut-off score, those who failed, those who didn't, how they relate to each other and so forth.

I did tell the Labor Board that I would treat any disclosure with complete confidentiality. I would not make a point of giving it out to the union so that the people in the future would know what kind of test they would be faced with going into one of these journeyman jobs. So there are various pieces of unfinished business in this case which I hope we can resolve.

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[9] (By Mr. Houghton) In terms of that issue and what should or shouldn't be presented, it is our position the union has the burden of showing where the company has not compiled with your opinion.

The opinion itself, if I can paraphrase it, said that with respect to employees who scored between 9.3 and 10.3, the Edison Company ought to take another careful look at their background, educational and otherwise, to determine whether there are any qualifications or abilities in their background that might offset their failure ot attain a satisfactory score on the examination or test, and that we have done.

As you may recall from your earlier case, there were three employees who scored within this gray area, if I may call it that, 9.3 and 10.3. Their names were Mr. Pratt, Mr. Longton and Mr. Burger. The company conducted extensive interviews with these individuals, reviewed their backgrounds, educational and otherwise, and reached the decision that of those three persons, one person did have a background which might overcome his failure to attain an "acceptable" score on the test. That was Mr. Pratt. Accordingly, and based on your decision, after that analysis and after the conclusion was reached, the company did promote him into the instrument man classification.

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[13] (By Mr. Lewis) Counsel says the opinion says those between 9.3 and 10.3 should be reviewed. I hate to keep harping on this, but I don't know who is between 9.3 and 10.3. I don't know who is 8. I don't know who is 7. I don't know who is 12. I don't know anything. I haven't been given the tests. I haven't been given the scores. I just don't know who is between 9.3 and 10.3.

I know that management asserts that three people were between 9.3 and 10.3, Pratt, Longton and Burger, but

that's just their own unilateral observation and decision, not mine. I don't really know whether there are more in that bracket or not. I have no way of knowing.

MR. HOUGHTON: With regard to whether there are more or not, a list was introduced at the earlier hearing giving the scores without names, and there are only three on that list. Those are everybody that took the test.

MR. LEWIS: Yes, but Ralph, it doesn't mean a thing to me, that list.

MR. HOUGHTON: It may not mean a thing to you, but you know there are only three persons in that range.

[14] MR. LEWIS: No, I don't. That's what you said.

THE ARBITRATOR: How would you go about doing more than this? Are you suggesting that the company may be less than truthful on this matter, Mr. Lewis?

MR. LEWIS: Well, I've been with this company for 20 years or more. It's not a case of whether I trust them or don't trust them. It's a case of business with me.

I know that from his side of the table—and I've known many of his supervisors for years, Franklin, Fischer and Ford; they would never let me make a statement that such is so. They'd say, "Prove it," you know. All I want them to do is prove it to me. So you give me the fact that employee A got 9, employee B got 8, employee C got 7. It doesn't mean a thing.

THE ARBITRATOR: What kind of proof do you wish, Mr. Lewis?

MR. LEWIS: I want the tests. I want the scores. I'm before the Labor Board on that question and I hope I'll win.

MR. HOUGHTON: If you had the tests, that wouldn't help you either because you wouldn't know how to score the tests. The tests don't tell you what a man got. We've had a witness testify that these are in fact the scores that the people received, and all you are saying if you don't believe that is that the witness lied.

[15] MR. LEWIS: Whether I believe it or not, I'm simply saying it is not good evidence, and you wouldn't accept it in court yourself.

MR. HOUGHTON: I sure would.

THE ARBITRATOR: Let me interject again that I believe as far as disclosure of the tests is concerned, that matter was resolved, at least for me, by the decision.

MR. LEWIS: You mean for your purposes it was.

THE ARBITRATOR: That is right.

MR. LEWIS: But see, there is a principle there.

THE ARBITRATOR: You are before the NLRB and I recognize that and I——

MR. LEWIS: Right, and I've got other companies in the United States where this is going to be a big item. You understand that.

THE ARBITRATOR: And they may agree or disagree with me on that question as to whether they should have been disclosed or not.

MR. LEWIS: It's not a case of agreeing with you or disagreeing with you. It's a case of whether we've got disclosure coming, under the Act. That's the way to put it. I have cases in Boston, Pittsburgh, Detroit and maybe one other place with the same argument, and none of them have been rejected yet. They are all in Washington.

[16] THE ARBITRATOR: Well, I think it's a difficult question.

MR. LEWIS: Right.

THE ARBITRATOR: At least I did a lot of work and study on that particular——

MR. LEWIS: You said from the Arbitrator's standpoint you couldn't subpoena them and you wouldn't under Michigan law.

THE ARBITRATOR: That is correct, and also some reasoning as to why I didn't believe that your case was injured by not having those tests, and you perhaps don't agree with me on that, and I think you don't.

MR. LEWIS: No, I don't, because we've got a whole new era, as you well know, of testing for promotions and Title 7 cases in the United States and it's going to loom big, this business of what is a proper test and what is not a proper test and whether it meets EEOC guidelines. You know, all this is coming in this decade and I think we are going to have tremendous casework on it, and I just had to get those cases in on those various NLRB boards and I have three.

THE ARBITRATOR: I am not suggesting that your actions might be incorrect or that you shouldn't have done it. All I am saying is that at this moment, before this Arbitrator, the matter of disclosure of the tests, this proceeding has been [17] resolved.

Now, I do believe—and perhaps I didn't thoroughly state that in the decision; I thought it was really clear, unambiguous and all else when I wrote it—that the union has a right to the test scores. Otherwise I do not see how they can police the contract.

MR. LEWIS: I don't either. But we didn't get them.

THE ARBITRATOR: You had some information, and perhaps I didn't get to that point clearly enough.

I certainly believe, Mr. Houghton, that the company has a duty to provide the union with the test scores, not the tests, but the test scores.

MR. HOUGHTON: As you will recall, we did go through that issue and expressed a very serious concern about confidentiality of placing names opposite scores.

THE ARBITRATOR: I realize that.

MR. HOUGHTON: We resolved that at the hearing in this fashion—and it was accepted at that time by the Arbitrator and the union: we would submit the lists of all the scores without names on them, and you will find that in the transcript.

MR. LEWIS: I didn't accept it. I said, "To expedite matters, if that's all you're going to do, let go. [18] There's no use staying here for six months."

Why would I be before the Labor Board if I accepted what you said?

MR. HOUGHTON: You are before the Labor Board to get the tests.

MR. LEWIS: And the scores. I'll read it.

MR. HOUGHTON: Be that as it may—maybe "accepted" isn't the right word. That issue as far as the company was concerned was resolved. There was certainly no mandate or directive in the opinion, unless I've missed it, that we at the conclusion turn over names along with the scores.

THE ARBITRATOR: I guess I fail to see how one can consider whether the award has been implemented without names attached to scores.

MR. HOUGHTON: Let's approach it in this fashion. You had a list of random scores. There were three scores on that list that were between 9.3 and 10.3, and as I understand your opinion, you were looking at those three scores and

saying those persons, whomever they may be, are entitled to be reviewed in more detail.

THE ARBITRATOR: That is correct, and that was one of the reasons why I could not say whether these qualifications met what, because I didn't know who was who.

MR. HOUGHTON: What we have done is we have [19] taken taken the three scores, determined to whom they belonged, and reviewed those three people. Now, as I understand Mr. Lewis' objection, if we face it objectively, what he is saying is, "How do I really know that the company took those three scores and they are actually the scores of Longton, Pratt and Burger? They may be the scores of Jones and Houghton."

We can give you those three scores. We can get a piece of paper and put 9.3 and put the three names there, or 9.4 or 9.7 or whatever they happen to be, but if we put a person on the stand who is in charge and says, "I took the scores and these are the persons," testifies under oath that those are the persons, I think that is certainly sufficient proof, and beyond that point I don't think there is really any serious question on this. I don't think Mr. Lewis is really saying the company intentionally substituted one person for another.

MR. LEWIS: No. I'm talking about good evidence, which you guys taught me over the years. Good evidence is good evidence.

MR. HOUGHTON: That's sufficiently good evidence.

MR. LEWIS: No, it isn't.

THE ARBITRATOR: I think I would agree with that, Mr. Houghton. If we could have the Detroit Edison employee who is responsible for that activity testify that these names do go [20] with those scores, then I will have to accept that as reliable evidence.

MR. LEWIS: As the Arbitrator.

THE ARBITRATOR: As the Arbitrator.

MR. LEWIS: No question, but the Labor Board don't, nor do I, you know, in connection with my principle that tests and scores should be disclosed to the union so that they can properly police and implement their contract. That's the generalized subject I'm at there. Not before you; it's a generalized subject I need for Boston, Pittsburgh and Detroit as well as other places.

THE ARBITRATOR: I understand your case before them.

MR. HOUGHTON: Aren't you really interested in pursuing the basic principle that you are entitled to all the scores, which you are after in the NLRB, as opposed to saying the company intentionally substituted one name for another? You are not saying that, are you?

MR. LEWIS: I really don't know. It just isn't good evidence to me for somebody to hand us a sheet and say, "Here, three guys got 10, four guys got 9, three guys got 8." It just doesn't do anything for me. As Leo Franklin, your supervisor, would say, it just isn't good evidence. I'm sure you couldn't give it to Judge Keith that way. He'd say, [21] "Wait a minute, let me see them."

MR. HOUGHTON: Do you want to bet?

MR. LEWIS: Yes, I'll bet. But anyway, that's beside the point.

MR. HOUGHTON: I guess my point is I think you can properly preserve your position and argue that you want test scores in the NLRB case without affecting what is going on here, and if you have any doubt——

MR. LEWIS: The professor has already said that——

MR. HOUGHTON: Excuse me. Let me finish. If you have any doubt as to whether these are the three correct persons, I'll be glad to put someone on the stand to verify that.

MR. LEWIS: The professor has already said that from his standpoint, to get the arbitration over with, he is not going to subpoena the tests; he can't do it under Michigan law and he thinks he can do the job without the actual tests and scoring.

I think that's what you said; is that right, sir?

THE ARBITRATOR: I'm saying I could find no relevant cases which gave to me the power under Michigan law. One could argue you might under national law.

[22] But I also came to a simultaneous conclusion, Mr. Lewis, which I think I expressed there, that I did not believe that the test itself would further your case. Now, that's my opinion.

MR. LEWIS: I appreciate that.

THE ARBITRATOR: Therefore, that issue, as far as I am concerned, the test itself has been resolved.

MR. LEWIS: But the scores would have.

THE ARBITRATOR: But the scores, I think, you are entitled to. If someone is to find out whether the award has been implemented, then this is necessary information.

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[32] WILLIAM L. ROSKIND
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOUGHTON

[33] Q. Your full name, for the record? A. William L. Roskind.

Q. What is your position with the Edison company? A. I'm the acting director of Industrial Psychology.

Q. How long have you held that position? A. Since July 1.

Q. Of this year? A. Yes.

Q. Prior to that time what was your position? A. I was the administrator of the Psychological Services at Detroit Edison Company.

Q. Are you the same Mr. Roskind that testified in the previous hearings in this case? A. Yes, I am.

Q. You are familiar with the grievance and the problem involved? A. Yes, I am.

Q. Have you, by the way, had in your possession and reviewed a copy of Arbitrator Jones' decision in this case? A. Yes, I have reviewed it.

Q. Pursuant to that decision I will ask you specifically what you did in determining which employees who were involved in this case and who took the test fell between 9.3 and 10.3. How did you go about determining who they were? [34] A. We had a list of, I think, 10 grievants, if I recall correctly, and I had the personnel test record card pulled for all 10 employees and checked——

Q. Let me interrupt you for just a second. What is that card that you are referring to? Where is that kept and what does it contain or what is its purpose? A. The card is our record of test performance for employees. Each employee and applicant for employment at the company who has taken a test to be used for selection purposes has a card filled out with their name and ID number on it and the list of tests and the batteries of tests that they have taken, the date and the scores.

Q. This is the basic original card of entry where the company keeps records of this sort? A. That is correct.

Q. Continue, please. A. I reviewed the 10 cards and discovered the three individuals who scored between 9.3 and 10.3. That information was relayed to the Union

Relations Department. In a meeting it was given to the Production Department.

Q. Do each of these cards have an employee's name on them? A. Yes.

Q. So if you found a card, for example, with 9.5, you would then take that employee's name off the card and submit [35] that? A. That's correct.

Q. In reviewing those 10 cards, how many did you find that fell between 9.3 and 10.3? A. There were three individuals who had a score between 9.3 and 10.3.

Q. Did you distribute those three names then to the Union Relations Department? A. That is correct.

Q. Mr. Roskind, the three names that we are stating are involved are a Richard Burger, Michael J. Pratt and Gary D. Longton. Are those the three names that you submitted? A. Yes, they are.

Q. And are those the three persons who had scored between 9.3 and 10.3? A. That's correct.

Q. Were there any others? A. No, there were not.

• • •

[50] THE ARBITRATOR: May I ask just one or two.

Mr. Roskind, when these scores were recorded, what kind of care procedure do you use in making certain there are no errors? I guess that's one point which bothers me a [51] little bit.

THE WITNESS: The people that make up these records are very conscientious and very careful. In the event there is any question, we have the actual test itself for one year after a testing situation. And the record exists in two different places, once in a card file and again on a computer input sheet in a coded form, and checks are made to see that these people are doing the job properly. It is a job that they feel very, very conscientious about doing.

• • •

Respondent's Exhibit No. 13

Report XLV

Study of Selection Tests
for Instrumentmen in the Power Plants

August 1970
Personnel Research
Employe Relations Department
The Detroit Edison Company

Summary

The selection tests used for instrumentmen in the power plants were revalidated.

The criterion consisted of supervisors' judgments of the kind of assistance which an instrumentman would need to perform each of 23 selected job tasks.

Complete test data and satisfactory criteria were available for 33 instrumentmen.

The tests were highly related to the criterion of job performance. A standard could be set which would provide a reliable factor in the selection of new instrumentmen.

Introduction

When we were doing research in the 1950's to help with selection, induction, training, and evaluation for operators in the power plants, Mr. Floyd Goulait, the Instrumentman Technician for the Production Department, insisted on the inclusion of instrumentmen in the research. He emphasized the importance of instrument work to the operation of the power plants and believed that the qualifications of men going into this work should be carefully studied. Instrumentmen entered this job primarily from the operating jobs. This practice of promotion from within was regarded

as a desirable practice, but it seemed evident that not all good operators were making good instrumentmen.

A task analysis of the instrumentman's job was made with the same method (critical incidents) being used in the study of the operating jobs. A battery of selection tests was constructed and tried out on a few men bidding into the instrumentman's jobs within one of the new plants, Tentative standards were set which have been used for about ten years.

Recently, the technical engineers of the power plants recognized the need for some improvement in the selection test battery. In the newer plants, more complex instrumentation and controls are being used. Nuclear plants may have additional complexity. More electronic instrumentation is being introduced.

It is recognized that selection standards need to be fair for all employe bidding into instrumentman's jobs. At the same time, selection standards need to be adequate for the development of the knowledge and skills which will be needed in an advancing technology.

Sample

Since about 1960 the tentative selection battery has been given to a number of our employes, some of whom have entered instrumentman's jobs. It appeared that enough employes had had some experience in this work who also had been given the selection test battery so that sufficient data for a study could be secured without additional testing.

A list of names for employes who had taken the instrumentman selection tests was compared with men who had entered the instrumentman's job and could be evaluated on their job performance at the time of this study. Forty-three such cases were identified. Criteria of job performance were secured for them.

Criterion

The criterion of job performance used in this study consists of ratings of a man's ability to do certain job tasks which were selected to be representative of the job as a whole in range and difficulty. The technical engineers selected 23 job tasks grouped in five categories from least to most complex. A list of these job tasks is included in the appendix.

There were 18 technical engineers and supervisors (evaluators) who had some knowledge about some of the 43 men of the sample. For each of these evaluators a set of rating material was prepared. The rating material consisted of directions and 23 sheets, each of which defined one of the 23 job tasks together with the names of the instrumentmen about which the evaluator had some knowledge.

Each evaluator was asked to mark for each instrumentman on a given job task whether the instrumentman could perform this task:

1. without assistance,
2. with *minor* assistance, such as from direction he could secure over the telephone,
3. with *major* assistance of a more competent or knowledgeable person working with him on the job site.

Provision was made for situations in which the evaluator was not able to rate the man on a given job task, and also for any comments which might help to understand the ratings provided.

For each instrumentman of the sample, a summation was made of the difficulty level (one through five) multiplied by the ratings of the nature of assistance needed (one through three) across all job tasks marked for this instrumentman. This summation was divided by the number of

tasks on which he was marked. This provided a single index of ability to perform the selected instrumentman tasks.

Within the sample there was a wide range of experience in instrument work from a few months to many years. Accordingly, the sample was divided into four groups:

1. less than one year,
2. one to two years,
3. three to seven years,
4. eight years or more.

The index described above was standardized within each of these four groups. This served to minimize differences in amount of experience among the men of the sample. Most of the instrumentmen were rated by more than one evaluator. The median of the standardized scores was used as a criterion for this study.

Results

1. *Criterion*

There were some cases on which evaluators were in considerable disagreement, most of whom had less than two years of experience. Ten of the 43 cases were eliminated from further analysis, seven with two years of experience or less, one with three years, one with four years, and one with twenty years. This left 33 cases with complete test data and a satisfactory criterion of their job performance.[1]

[1] While it is undesirable from a purely statistical standpoint to remove cases, from a practical standpoint it is difficult to tell how successful a man is on the job when one evaluator rates him very high and another rates him very low. It was originally intended to include only those with more than two years of experience, but the sample was so small, it was important to secure as much data as possible.

2. *Test Results*

The tests in this battery consist of three tests, one of which has six parts. Each of the tests and each of the parts of tests were correlated with the criterion as described above. These correlations are shown in the appendix. Using scores for the two tests and the six-part scores of the third test, the multiple correlation with the criterion was .76 (F=4.02). Using the total score for the three tests, the multiple correlation with the criterion was .73 (F=11.00).

One of these three tests was acting as a suppressor. On graphical analysis, it was found that this test was adding to the predictive value of the battery only at the low end of scores. In this situation where instrumentmen are selected primarily from operating personnel of the power plants, it does not seem necessary to include this third test. Using the two remaining tests, the multiple correlation with the criterion was .71 (F=15.25). From the standpoint of stability in applying this test battery to new men, it was decided to construct the test battery using only these two tests.

The results of the proposed test battery may be shown graphically as in the accompanying chart. The sample was divided into two groups, those rated below average and those rated above average. The middle case was assigned by tossing a coin. It can be observed that the test battery shows marked discrimination between those who are rated high in job performance and those who are rated low. Furthermore, a satisfactory standard could be set within a rather wide range, depending on

For this reason, ratings were secured for the complete sample, even those who had less than six months of experience in this work. Ratings with differences of more than 1⅓ standard deviations were considered too big a difference for inclusion in the sample.

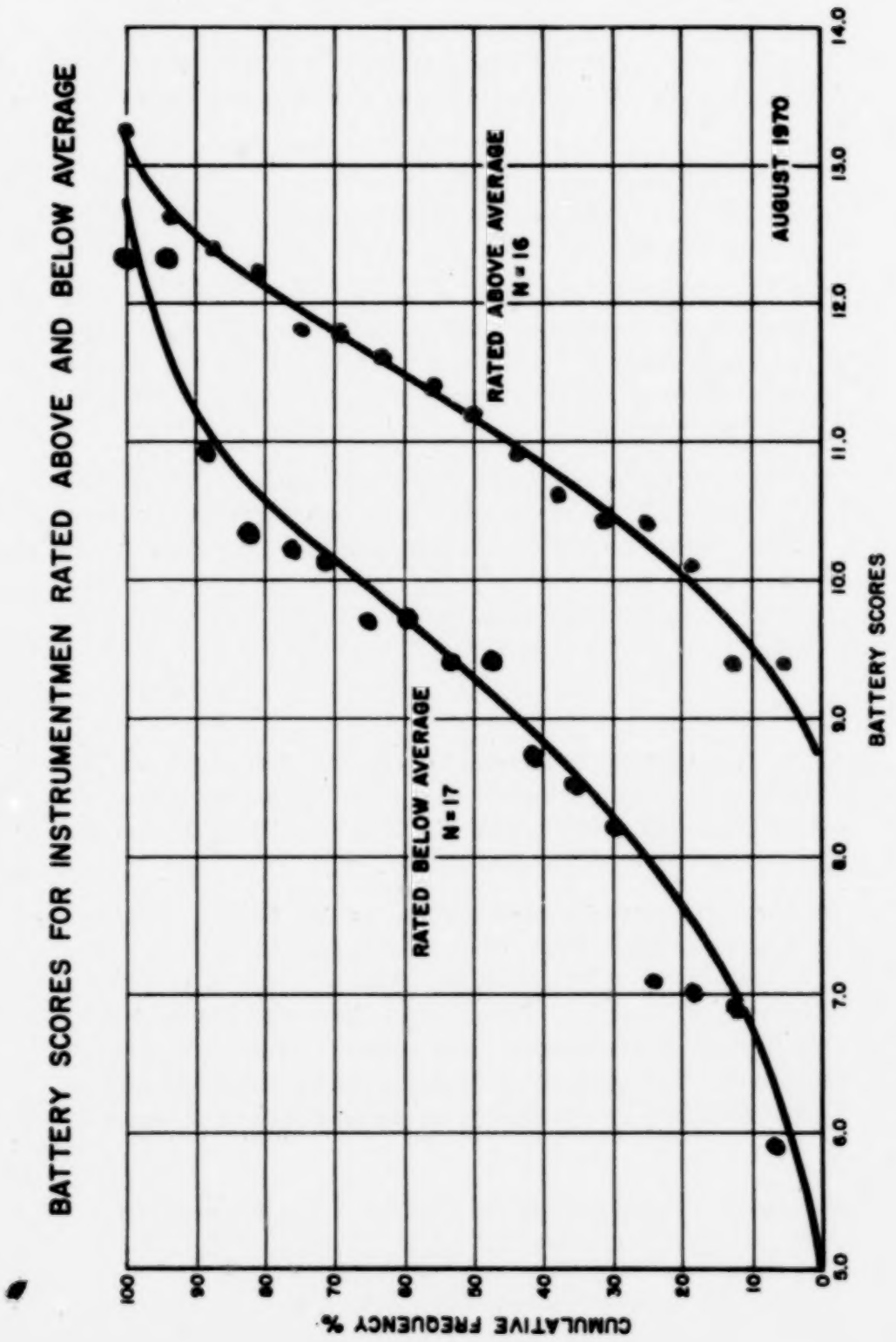
the needs of the department and the population from which selections are made.

3. *Electronic Instruments*

With the introduction of more electronic instrumentation, it seemed desirable to make some attempt to project the results of the present study for future installations. At present, research designed specifically in this area probably would not be possible because of the number of instrumentmen who have had exclusive experience with this kind of equipment. However, an attempt was made to try to secure some kind of approximation of the direction which qualifications probably would take.

An assumption was made that changes and qualifications would be in the direction of:

1. more analysis and/or understanding of conditions which must be inferred, rather than observed with the senses,
2. more manipulation of concepts as opposed to objects.



It appeared that some of the 23 tasks which are described above might have more of the above content. Accordingly, the technical engineers provided a second rating of the 23 tasks on the basis of the above assumption.

The correlations between the ratings on this assumption with the ratings previously supplied on the basis of complexity was .95.

It seems that the best interpretation which can be made from the data at hand is that most instrumentmen who are capable within the present system are likely to be those capable within systems with more electronic instrumentation.

A more definitive study should be conducted sometime in the future as more instrumentmen have experience with more electronic instruments. In the meantime it seems that the selection requirements will not be badly out of line with the requirements of the job within the immediate years ahead.

Conclusions

The test battery developed in this study showed a high relationship to performance on the job. Standards can be set on this test battery and used as a reliable factor in future selections of instrumentmen.

Obviously, other factors than the test battery are important in the selection process. The test battery consists of a measure of ability to do the tasks selected to be representative of this job. There are other qualifications for satisfactory performance than sheer ability to perform these tasks. The present study demonstrates that one factor in selection may be a standard on the test battery developed.

Appendix

CORRELATIONS OF TESTS WITH CRITERION AND INTERCORRELATIONS

(N=33)

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*
1. Criterion		.33	.47	.65	.50	.32	.53	.39	.42	.62
2. Personnel	.33		.26	.67	.48	.39	.48	.24	.59	.54
3. M.P.F.B.	.47	.26		.32	.33	.05	.08	.35	.22	.52
E.P.S.A.T.										
4. Total*	.65	.67	.32							
5. Mathematics	.50	.48	.33			.34	.25	.31	.29	.43
6. Formulation	.32	.39	.05		.34		.37	.32	.34	.46
7. Phys. Sci. Comp.	.53	.48	.08		.25	.37		.30	.63	.62
8. Arith. Reasoning	.39	.24	.35		.31	.32	.30		.12	.45
9. Verbal Comp.	.42	.59	.22		.29	.34	.63	.12		.54
10. Mechanical Comp.	.62	.54	.52		.43	.46	.62	.45	.54	
Mean	10.2	26.8	42.2	72.7	9.3	3.8	19.2	4.6	19.5	16.3
Standard Deviation	2.5	5.0	7.7	23.8	5.1	2.2	8.7	2.9	9.3	4.1

* The total score on the E.P.S.A.T. was not correlated with its parts.

Listing of Job Tasks Selected to be Representative of the Instrumentman's Job in Range and Difficulty

Pressure Measuring Instruments:

1. Install mechanism and calibrate a Bourdon tube pressure guage.
2. Install a new diaphragm and calibrate a draft gauge.

Temperature Measuring Instruments:

3. Troubleshoot a grounded thermocouple wire in a multi-thermocouple measuring system.
4. Troubleshoot erratically-printing multi-point temperature recorder.

Level Measuring Instruments:

5. Calibrate a drum level recorder.
6. Troubleshoot erroneously-reading condensate storage water level indicator or recorder.

Flow Measuring Instruments:

7. Calibrate a differential pressure water flow meter.
8. Calibrate a boiler air flow meter.
9. Troubleshoot an obvious low reading on a steam flow meter.

Alarms and Trips:

10. Troubleshoot a malfunctioning furnace flame-sensing system.
11. Install a pressure switch completely.

Plant Water Practices:

12. Properly take a good water sample.

13. Trouble chlorinator malfunction when chlorinator is not chlorinating.

Miscellaneous:

14. Troubleshoot control air dryer malfunction.
15. Use Instrument Shop filing system properly.

Control System and Components:

16. Overhaul and recalibrate a pneumatic signal transmitter.
17. Calibrate a pneumatic controller in the Instrument Shop.
18. Overhaul a valve positioner and restroke the valve properly.
19. Characterize the drive on a damper.
20. Troubleshoot a complete control system for malfunctioning automatic control. System has a minimum of two proportional and one reset actions.
21. Retune a marginally-working automatic control system which has a minimum of four proportional, two reset, and one rate actions.
22. Troubleshoot a non-transferable soot blower control system.
23. Set up the boiler feed pump recirculation control system with newly-installed instruments and controls.

Respondent's Exhibit No. 14

JOB CLASSIFICATION 1
INSTRUMENT MAN

A Supplement To
Revalidation Research on Employment Selection Tests:

THE DETROIT EDISON COMPANY

Submitted
December 6, 1972

By

NATIONAL COMPLIANCE COMPANY
Dallas, Texas

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Job Classification 1

Instrument Man

Introduction. When NCC prepared previous research for The Detroit Edison Company, there was not an adequate sample of Instrument Men to arrive at any justifiable conclusions. Only 4 men who were selected for this classification during the period 1967-70, inclusive, were still on the job. In order to inquire into the validity of the Instrument Man battery, we decided to collect data on men who were hired before 1967. What follows is a report of that validation study.

Job description. Instrument Man is a job classification found in the Production Department. An employee in this category installs, maintains, repairs, calibrates, tests, and adjusts precision instruments in the power plants. There is a normal line of progression in this job from Instrument Man Third Class to Instrument Man First Class.

Although the Instrument Men are, as their job title indicates, ostensibly concerned with all manner of control instruments, they have other responsibilities as well. They instruct operators and maintenance men in the use and functions of instruments and controls. Instrument Men are also concerned with boiler water analysis and treatment, including checks for oxygen content, conductance, and acidity of condensate and boiler feed water. They frequently handle chemicals such as sulphuric and hydrochloric acid, caustic soda, ammonia, and chlorine. They may assist in any tests requested by Technical Engineers or engineering staff and they are responsible for training, assigning, and directing the work of lower rated Instrument Men.

Typical duties of Instrument Men include working with the entire array of gauges, meters, recording devices, and so forth that are found in power plants. They are also responsible for the installation, calibration, maintenance, and operation of automatic control systems which control

boilers and their associated equipment. In addition, they are responsible for the maintenance of both mechanical and electrical tripping and alarm devices. These may include pressure devices, temperature devices, storage level indicators, and miscellaneous alarm devices such as high wind velocity, crane gantry locks and leakage alarms for smoke and other kinds of fumes. In order to prevent scale formation in boiler tubes, oxygen corrosion, contamination of the condensate system, and slime forming in cooling systems, it is necessary to maintain close control over water quality. In their work they use a wide range of hand tools from jewelers' tools needed in the repair of small clock and control mechanisms to wrenches of all sizes and types, from minute to very large. They are accustomed to working to very close tolerances under tedious conditions. They occasionally act as guides in escorting civic groups through the power plants and are frequently called upon to read and work from mechanical and electrical blueprints and schematic drawings and from wiring diagrams. Mathematics is required as they use charts, curves, tables, graphs, and square root and percentage calculations in their daily instrument calibration. In summary, the duties of the job require both technical know-how and a diligent application to the work.

Job analysis has revealed that the physical skills required of an Instrument Man involve considerable hand-eye coordination and extremely accurate touch in adjusting, calibrating, and repair of delicate instruments. Physical effort required on the job is great. Frequent stooping, bending, crawling, climbing, and standing while making repairs on instruments are encountered. No specialized education is required for entry into the Instrument Man progression; however, the incumbent must acquire background electrical knowledge equal to six months of full-time schooling. He may accomplish this by passing the department's basic electrical course or demonstrate this by passing a department examination. Fairly frequent opportunity to cause

extremely serious operating conditions from misjudgment or erroneous action exists. Instrument Men are often exposed to hazards as well as adverse working conditions. Instrument Men are responsible for seeing that safety rules and practices are properly observed. They have to be mindful of hazards to others while performing their work. Although established maintenance procedures are used, Instrument Men frequently must use their own initiative in how to repair and calibrate under unforeseen conditions and carry jobs through to completion. Their work is spot-checked occasionally, mostly by the level of results. They regularly work alone or with a helper. Thus, Instrument Man is a demanding job both in terms of electrical knowledge and physical effort.

Review of studies. During the mid-50s when research was being conducted on the selection, training, and evaluation of operators in the power plants, the Production Department requested that Instrument Men be included in the research. Instrument Men enter the job primarily from the operating jobs. The practice of promotion from within was regarded as a desirable practice, but it seemed evident that not all good operators were making good Instrument Men. A task analysis of the Instrument Man job was made using the critical incident method. A battery of selection tests was constructed and tried out on men bidding into the Instrument Men jobs.

In 1970, the Technical Engineers of the power plants recognized the need for improvement in the selection of Instrument Men. In the newer plants more complex instrumentation and more electronic controls are used. Nuclear plants have even additional control complexity.

In August, 1970, the Personnel Research Section of the Employee Relations Department of DECo published a document on the validation of the selection battery for Instrument Men. They were able to identify 43 men who

were Instrument Men incumbents who had taken the selection battery. Criteria of job performance were secured for these men.

The criterion selected was a most ingenious one. Job performance was measured by ratings of a man's ability to do certain job tasks which were selected to be representative of the job as a whole in range of complexity and difficulty. Technical Engineers selected 23 job tasks which were grouped into 5 categories from least to most complex. Evaluations were secured for each Instrument Man from as many supervisors who were sufficiently familiar with his work. Evaluators were asked to rate each Instrument Man on a given job task depending on whether the incumbent could perform that task without assistance, with minor assistance, or with major assistance. Provisions were made for situations in which the evaluator was not able to rate the man on a given job task. The criterion measure was scored by summing the product of the difficulty level multiplied by rating of the nature of assistance needed across all job tasks. This summation was divided by the number of tasks on which an individual was marked. This provided a single index of ability to perform the selected Instrument Men tasks.

Within the sample experience in instrument work ranged from a few months to many years. The sample was divided into 4 groups on length of experience: those who had been on the job less than one year, those with one to two years experience, from three to seven years, or eight years or more. The single summary index described above was standardized within each of the 4 groups. There remained 33 cases with complete test data and satisfactory criterion scores.

The results of the study showed that the selection battery was working quite well. The tests in the battery included the Personnel Test, the Minnesota Paper Form Board, and the Engineering and Physical Sciences Aptitude Test. Each

of the tests and its subsections were correlated with the criterion described above. Using the total score for the three tests, the multiple correlation obtained was .73 (F = 11.00). These results are, of course, highly statistically significant.

In that previous report some speculation as to the directions which qualifications of future Instrument Men would take was made. With the advent and installation of increasing amounts of electronic instrumentation, it was determined that in the future Instrument Men would need to have qualifications which would allow them to make inferences regarding analysis and/or understanding of conditions which could be inferred rather than observed with the senses. It was forecast that future Instrument Men would be more frequently manipulating concepts as opposed to objects.

Predictors. As indicated directly above, three tests are administered in the selection battery for Instrument Men. The three tests in this battery are:

Personnel Test

Minnesota Paper Form Board

Engineering and Physical Sciences Aptitude Test

Descriptions of these tests can be found in Appendix A. The predictor variables were summarized in two ways. First, multiple regression resultants were calculated for each individual Instrument Man using the beta weights obtained in the previous research. Also, a unit weighting scheme was applied which is referred to here as Sum of Standard Scores. This summary predictor variable was obtained by calculating the sum of the standard scores across all tests in the battery. This is a simple statistical technique which adjusts for the average score and the dispersion on each test. It allows the addition of an individual

score on one test to scores on others until a grand sum is reached.

Performance rating scales. A performance rating scale was not designed by NCC for this job classification. After our discussions with Detroit Edison personnel, we determined that the Instrument Man rating scale which had been previously used would be entirely appropriate. We took the listing of job tasks selected to be representative of the Instrument Man's job in range of complexity and difficulty and looked at how they ranged from simple to most complex. Beginning with the 23 tasks, we discovered that there were 9 tasks at the two highest levels of difficulty. Rating scales reflecting the remaining 14 tasks of a lower difficulty level were printed since we did not plan to evaluate men with more than 5 years experience. Only later was it discovered that there would not be a sufficient number of Instrument Men hired during the years 1967-70 to make an adequate sample. Thus, in this research, an abbreviated Instrument Man rating scale (see Appendix B) was administered to all Instrument Men working in the DECo system who had received the Instrument Men test battery.

The performance rating scale was scored in a fashion highly similar to that in the previous work performed by Detroit Edison. A summary was made across all 14 items of the cross-product between the item difficulty (1-3) times the evaluator's judgment of whether the incumbent could perform the particular task with major assistance, minor assistance, or with assistance (1-3). Thus, a total of 9 points was possible for each item times the 14 items, giving the highest total possible as 126 points. The highest rating score obtained by any individual was 102 points and the lowest was 59 points (see Appendix C). This gave us confidence that even with eliminating the nine most difficult items, the rating scale did an effective job of estimating the range of performance of persons evaluated on the rating scale.

In order to be able to make better comparison with the previous study, we also made an adjustment to the total rating score. This adjustment was made by dividing the persons into 4 groups on the basis of their work experience as follows: less than one year, one or two years, three to eight years, more than eight years. This adjustment on the total rating score provided a criterion which would be roughly comparable for men with differences in length of experience.

Sample. The sample of Instrument Men is not large but is sufficient that we can have confidence in the results. There were a total of 35 men who had taken the Instrument Man selection battery described above who were still working with the company in June, 1972. Performance rating scales were obtained on all 35 of these men. A tabular description of the sample can be found in Table 1. All of the subjects

were males. There were no minority group members in the sample.

TABLE 1.

SAMPLE DESCRIPTION FOR INSTRUMENT MAN

AGE AND EDUCATION LEVEL			
	Number	Mean	S.D.
Current Age	35	43.33	7.872
Education Level at Testing	35	11.80	1.011
Years of Experience as of 1972	35	6.68	6.569

Results. Correlation analysis revealed that the test battery taken as a whole is statistically significantly related to the job performance summary measures. The sum of the standard scores on the three tests in the battery was statistically significantly related to both the unadjusted total

rating score and the adjusted total rating score (see Table 2). Similarly, the multiple regression resultant on the two tests which DECo is now using in selection was statistically

TABLE 2.

CORRELATIONS OF SUMMARY PREDICTOR VARIABLES WITH SUMMARY PERFORMANCE VARIABLES (N = 35)

	Performance Variables	
Test Battery Variables	Unadjusted Total Rating Score	Adjusted Total Rating Score
Sum of Standard Scores (three tests)	.338	.412
Multiple Regression Resultant (two tests)	.410	.407

Note-. With df = 33, r necessary to reject at .01 level, one-tailed test is .392; r necessary to reject at .05 level, one-tailed test is .283.

significantly related to both the adjusted and unadjusted total rating scores. Scatter plots for these four correlations can be found in Appendix E. Correlations between the individual tests, their subscales, and the criterion variables can be found in Appendix D. It is apparent from examining these correlations that the combining of tests into a battery raises the efficiency of prediction. Best separate prediction

is obtained from subsections of the Engineering and Physical Sciences Aptitude Test.

The complete correlation matrix also shows that years of experience is related to the unadjusted rating scores but is not related to the adjusted total rating score. Thus, it appears that the partitioning of the sample into 4 groups as a function of their experience worked effectively. The smallest magnitude correlation between the test battery summary variable and the performance summary variable was found between the sum of the standard scores on the three tests and the unadjusted total rating score ($r = .338$, $p < .05$, one-tailed test). When years of experience on the job is removed by statistical means, the resultant correlation becomes .461 ($p < .01$, one-tailed test). A complete correlation matrix showing relationships between all variables can be found in Appendix D.

As a check on the reliability of the criterion variable, adjusted total rating scores from the previously used 23-item rating scale were correlated with adjusted total rating scores from the present 14-item scale. For the 33 persons with both data sets, the correlation obtained was .791 ($p < .01$, one-tailed test). The Instrument Men rating scale appears to be a highly reliable performance measure.

Differential validity. No analysis to demonstrate differential validity was possible.

Discussion. It has been reported above that the total test battery is statistically significantly related to the two criterion variables for the job of Instrument Man. The test battery appears to be effectively selecting men who will perform better as Instrument Men. Additional data need to be collected regarding differential validity.

Appendix A

Engineering and Physical Sciences Aptitude Test, Part IV

Description: Six ability tests for high school students entering engineering training

Author: Bruce V. Moore, C. M. Lapp, and Charles H. Griffin

Publisher: The Psychological Corporation, 1943

Minnesota Paper Form Board

Description: "Seeing" how part of a diagram would fit together to make a complete diagram

Author: Rensis Likert and William H. Quasha, 1941

Publisher: The Psychological Corporation

Personnel Test

Description: General mental ability, composite of several abilities

Author: E. F. Wonderlic, 1922

Publisher: E.F.Wonderlic

Employee ID Number _____ Rater ID Number _____

Job Code Number _____ Date _____

INSTRUMENTMAN RATING SCALE

1. Can install the mechanism and calibrate a Bourdon tube pressure gauge.

Can do it: with major assistance (a more competent or knowledgeable person working with him on the job site)	with minor assistance (such as from directions he could get over the telephone)	without assistance
_____	_____	_____

2. Install a new diaphragm and calibrate a draft gauge.

Can do it: with major assistance	with minor assistance	without assistance
_____	_____	_____

3. Troubleshoot a grounded thermocouple wire in a multi-thermocouple measuring system.

Can do it: with major assistance	with minor assistance	without assistance
_____	_____	_____

4. Troubleshoot an erratically printing multi-point temperature recorder.

Can do it: with major assistance	with minor assistance	without assistance
_____	_____	_____

5. Calibrate a drum level recorder.

Can do it: with major assistance	with minor assistance	without assistance
_____	_____	_____

6. Troubleshoot an erroneously reading condensate storage water level indicator or recorder.

Can do it: with major assistance	with minor assistance	without assistance.
_____	_____	_____

7. Calibrate a differential pressure water flow meter.

Can do it: with major assistance	with minor assistance	without assistance
_____	_____	_____

8. Calibrate a boiler air flow meter.

Can do it: with major assistance	with minor assistance	without assistance
_____	_____	_____

9. Completely install a pressure switch.

Can do it: with major assistance	with minor assistance	without assistance
_____	_____	_____

10. Properly take a good water sample.

Can do it:
with major assistance _____ with minor assistance _____ without assistance _____

11. Troubleshoot control air dryer malfunction.

Can do it:
with major assistance _____ with minor assistance _____ without assistance _____

12. Properly use instrument shop filing system.

Can do it:
with major assistance _____ with minor assistance _____ without assistance _____

13. Overhaul and recalibrate a pneumatic signal transmitter.

Can do it:
with major assistance _____ with minor assistance _____ without assistance _____

14. Calibrate a pneumatic controller in the Instrument Shop.

Can do it:
with major assistance _____ with minor assistance _____ without assistance _____

THE DETROIT EDISON COMPANY 9/18/72

STATISTICAL SUMMARY OF SPECIFIED VARIABLES

VARIABLE NAME	NUMBER	MIN	MAX	MEAN	STD.DEV.
1 YEARS OF EXPER.	35	1.0	20.0	6.68	6.569
2 PERS. (RAW)	35	9.0	35.0	23.60	5.281
3 PERS. CORRECTED FOR AGE	35	13.0	38.0	25.88	4.963
4 MPFB	35	21.0	54.0	41.42	8.536
5 EPSAT-MATH	35	1.0	20.0	9.17	4.847
6 EPSAT-FORM	35	0.0	10.0	3.62	2.479
7 EPSAT-PHYS. SCI. COMP.	35	0.0	35.0	17.79	9.038
8 EPSAT-ARITH. REAS.	35	0.0	14.0	4.28	2.865
9 EPSAT-VERB. COMP.	35	4.0	38.0	20.74	9.066
10 EPSAT-MECH. COMP.	35	5.0	21.0	16.14	4.486
11 EPSAT TOTAL	35	28.0	115.0	71.97	23.472
12 PERS. CORRECTED FOR AGE (STD. SCORE)	35	-28.0	22.0	-2.22	9.926
13 MPFB (STD. SCORE)	35	-25.0	14.0	-0.71	7.748
14 EPSAT TOTAL (STD. SCORE)	35	-19.0	10.0	-0.14	10.192
15 UNADJUSTED TOTAL RATING SCORE	35	59.0	132.0	87.45	12.460
16 ADJUSTED TOTAL RATING SCORE	35	5.0	15.0	9.88	2.699
17 SUM OF STANDARD SCORES	35	-52.0	38.0	-3.08	21.194
18 MULTIPLE REGRESSION RESULTANT	35	59.0	132.0	100.60	16.624

BASE IS INSTRUMENT MEN

PREPARED BY --
NATIONAL COMPLIANCE COMPANY
9/18/72

IT EDISON COMPANY 9/18/72

CORRELATION ANALYSIS FOR SPECIFIED VARIABLES

(SAMPLE SIZES IN PARENTHESES)

!ABLE NAME	1	2	3	4	5	6	7	8	9	10	11
OF EXPER.	1.000 (351)	-0.335 (351)	-0.197 (351)	-0.128 (351)	-0.277 (351)	-0.299 (351)	0.120 (351)	-0.063 (351)	-0.113 (351)	-0.261 (351)	-0.148 (351)
(RAW)	-0.335 (351)	1.000 (351)	0.935 (351)	0.224 (351)	0.494 (351)	0.340 (351)	0.401 (351)	0.281 (351)	0.484 (351)	0.459 (351)	0.609 (351)
CORRECTED FOR AGE	-0.197 (351)	0.935 (351)	1.000 (351)	0.206 (351)	0.416 (351)	0.287 (351)	0.479 (351)	0.155 (351)	0.514 (351)	0.418 (351)	0.598 (351)
	-0.128 (351)	0.224 (351)	0.206 (351)	1.000 (351)	0.265 (351)	0.015 (351)	0.039 (351)	0.244 (351)	0.070 (351)	0.454 (351)	0.215 (351)
-MATH	-0.277 (351)	0.494 (351)	0.416 (351)	0.265 (351)	1.000 (351)	0.467 (351)	0.309 (351)	0.369 (351)	0.144 (351)	0.392 (351)	0.558 (351)
-FORM	-0.299 (351)	0.340 (351)	0.287 (351)	0.015 (351)	0.467 (351)	1.000 (351)	0.352 (351)	0.284 (351)	0.295 (351)	0.441 (351)	0.571 (351)
-PHYS. SCI. COMP.	0.120 (351)	0.401 (351)	0.479 (351)	0.039 (351)	0.309 (351)	0.352 (351)	1.000 (351)	0.300 (351)	0.586 (351)	0.538 (351)	0.692 (351)
-ARITH. REAS.	-0.063 (351)	0.281 (351)	0.155 (351)	0.244 (351)	0.369 (351)	0.284 (351)	0.300 (351)	1.000 (351)	0.026 (351)	0.390 (351)	0.429 (351)
-VERB. COMP.	-0.113 (351)	0.484 (351)	0.514 (351)	0.070 (351)	0.144 (351)	0.295 (351)	0.586 (351)	0.026 (351)	1.000 (351)	0.480 (351)	0.772 (351)
-MECH. COMP.	-0.261 (351)	0.459 (351)	0.418 (351)	0.454 (351)	0.392 (351)	0.441 (351)	0.538 (351)	0.390 (351)	0.480 (351)	1.000 (351)	0.759 (351)
TOTAL	-0.148 (351)	0.609 (351)	0.598 (351)	0.215 (351)	0.558 (351)	0.571 (351)	0.852 (351)	0.429 (351)	0.772 (351)	0.759 (351)	1.000 (351)
CORRECTED FOR AGE (STD. SCORE)	-0.197 (351)	0.935 (351)	0.999 (351)	0.206 (351)	0.416 (351)	0.287 (351)	0.479 (351)	0.155 (351)	0.514 (351)	0.418 (351)	0.598 (351)
(STD. SCORE)	-0.126 (351)	0.227 (351)	0.210 (351)	0.999 (351)	0.262 (351)	0.010 (351)	0.043 (351)	0.245 (351)	0.067 (351)	0.458 (351)	0.215 (351)
(TOTAL (STD. SCORE)	-0.145 (351)	0.608 (351)	0.596 (351)	0.213 (351)	0.557 (351)	0.570 (351)	0.854 (351)	0.427 (351)	0.769 (351)	0.761 (351)	0.999 (351)
JUSTED TOTAL RATING SCORE	0.382 (351)	0.121 (351)	0.167 (351)	0.188 (351)	-0.052 (351)	0.100 (351)	0.501 (351)	0.392 (351)	0.229 (351)	0.329 (351)	0.373 (351)
STED TOTAL RATING SCORE	0.004 (351)	0.238 (351)	0.286 (351)	0.379 (351)	0.129 (351)	0.106 (351)	0.275 (351)	0.221 (351)	0.179 (351)	0.348 (351)	0.306 (351)
OF STANDARD SCORES	-0.208 (351)	0.813 (351)	0.832 (351)	0.564 (351)	0.558 (351)	0.412 (351)	0.691 (351)	0.369 (351)	0.635 (351)	0.749 (351)	0.825 (351)
IPLE REGRESSION RESULTANT	-0.170 (351)	0.602 (351)	0.587 (351)	0.555 (351)	0.571 (351)	0.491 (351)	0.740 (351)	0.452 (351)	0.687 (351)	0.815 (351)	0.931 (351)

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9/18/72

THE DETROIT EDISON COMPANY 9/18/72

CORRELATION ANALYSIS FOR SPECIFIED VARIABLES

(SAMPLE SIZES IN PARENTHESES)

VARIABLE NAME	12	13	14	15	16	17	18	
1 YEARS OF EXPER.	-0.197 (351)	-0.126 (351)	-0.145 (351)	0.382 (351)	0.004 (351)	-0.208 (351)	-0.170 (351)	(
2 PERS. (RAW)	0.935 (351)	0.227 (351)	0.608 (351)	0.121 (351)	0.258 (351)	0.813 (351)	0.602 (351)	(
3 PERS. CORRECTED FOR AGE	0.999 (351)	0.210 (351)	0.596 (351)	0.167 (351)	0.265 (351)	0.832 (351)	0.587 (351)	(
4 MPFR	0.206 (351)	0.999 (351)	0.213 (351)	0.188 (351)	0.379 (351)	0.564 (351)	0.555 (351)	(
5 EPSAT-MATH	0.416 (351)	0.262 (351)	0.557 (351)	-0.052 (351)	0.129 (351)	0.558 (351)	0.571 (351)	(
6 EPSAT-FORM	0.287 (351)	0.010 (351)	0.570 (351)	0.100 (351)	0.106 (351)	0.412 (351)	0.491 (351)	(
7 EPSAT-PHYS. SCI. COMP.	0.479 (351)	0.043 (351)	0.854 (351)	0.501 (351)	0.275 (351)	0.691 (351)	0.740 (351)	(
8 EPSAT-ARITH. REAS.	0.155 (351)	0.245 (351)	0.427 (351)	0.392 (351)	0.221 (351)	0.369 (351)	0.455 (351)	(
9 PSAT-VERB. COMP.	0.514 (351)	0.067 (351)	0.769 (351)	0.229 (351)	0.179 (351)	0.635 (351)	0.687 (351)	(
10 EPSAT-MECH. COMP.	0.418 (351)	0.458 (351)	0.761 (351)	0.338 (351)	0.348 (351)	0.729 (351)	0.815 (351)	(
11 EPSAT TOTAL	0.598 (351)	0.215 (351)	0.999 (351)	0.293 (351)	0.336 (351)	0.832 (351)	0.931 (351)	(
12 PERS. CORRECTED FOR AGE (STD. SCORE)	1.000 (351)	0.210 (351)	0.596 (351)	0.167 (351)	0.264 (351)	0.832 (351)	0.587 (351)	(
13 MPFR (STD. SCORE)	0.210 (351)	1.000 (351)	0.212 (351)	0.190 (351)	0.382 (351)	0.565 (351)	0.554 (351)	(
14 EPSAT TOTAL (STD. SCORE)	0.596 (351)	0.212 (351)	1.000 (351)	0.296 (351)	0.307 (351)	0.838 (351)	0.930 (351)	(
15 UNADJUSTED TOTAL RATING SCORE	0.167 (351)	0.190 (351)	0.296 (351)	1.000 (351)	0.745 (351)	0.338 (351)	0.410 (351)	(
16 ADJUSTED TOTAL RATING SCORE	0.264 (351)	0.382 (351)	0.307 (351)	0.745 (351)	1.000 (351)	0.519 (351)	0.407 (351)	(
17 SUM OF STANDARD SCORES	0.832 (351)	0.566 (351)	0.838 (351)	0.338 (351)	0.412 (351)	1.000 (351)	0.925 (351)	(
18 MULTIPLE REGRESSION RESULTANT	0.587 (351)	0.554 (351)	0.930 (351)	0.410 (351)	0.467 (351)	0.925 (351)	1.000 (351)	(

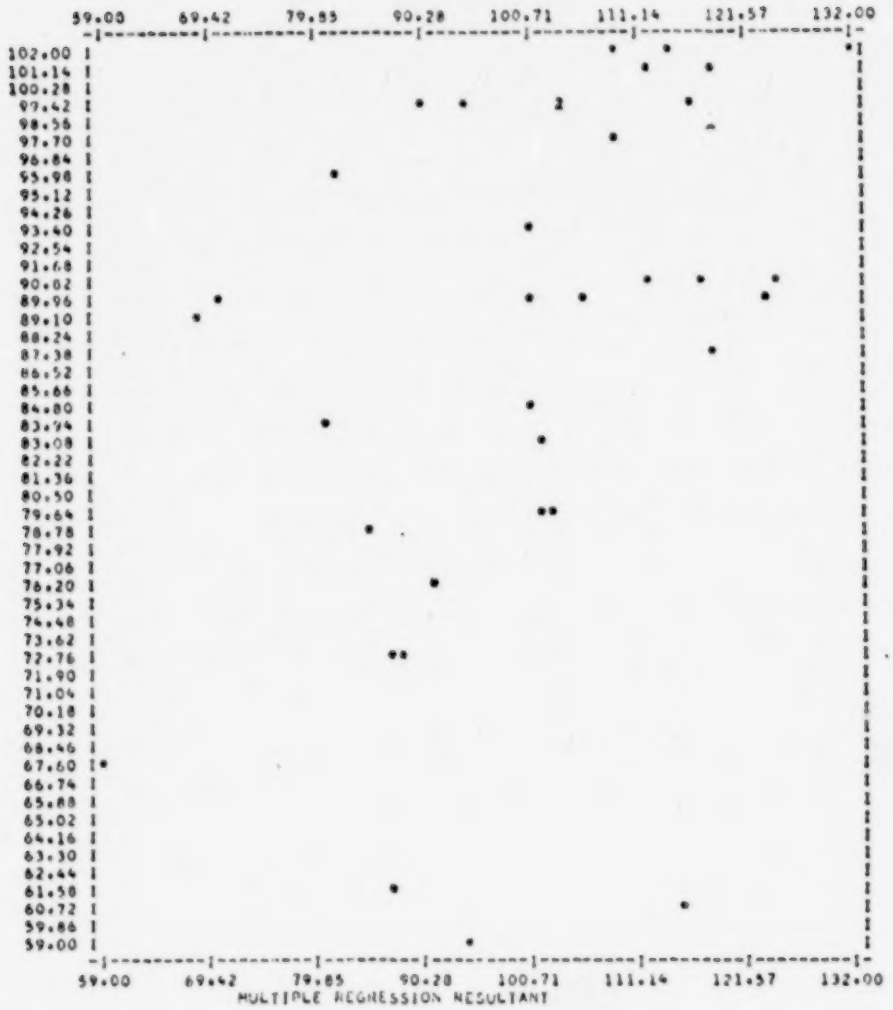
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THE DETROIT EDISON COMPANY 9/18/72

COMPLIANCE ANALYSIS SYSTEM - PAIRWISE PLOT

UNADJUSTED TOTAL RATING SCORE
VS
MULTIPLE REGRESSION RESULTANT



BASE IS INSTRUMENT MEN
NUMBER OF EMPLOYEES = 35

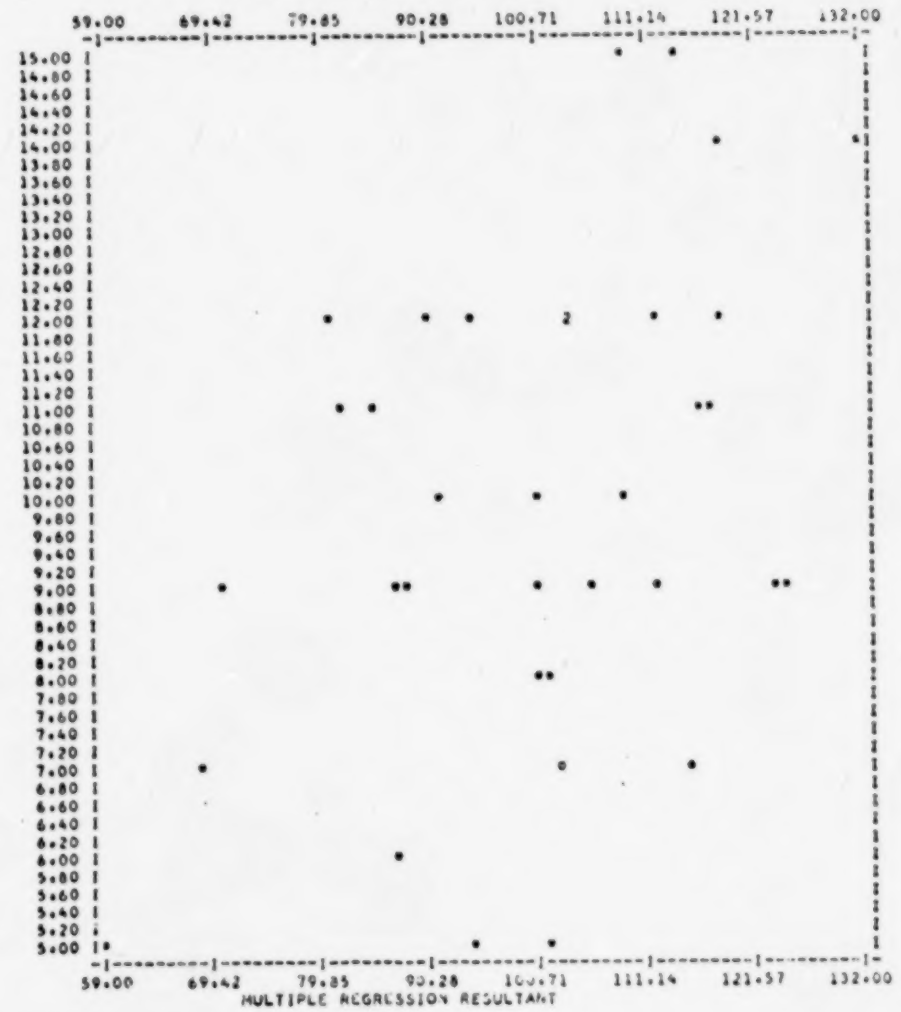
CORRELATION = 0.410

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COMPLIANCE ANALYSIS SYSTEM - PAIRWISE PLOT

ADJUSTED TOTAL RATING SCORE
VS
MULTIPLE REGRESSION RESULTANT



BASE IS INSTRUMENT MEN
NUMBER OF EMPLOYEES = 35

CORRELATION = 0.407

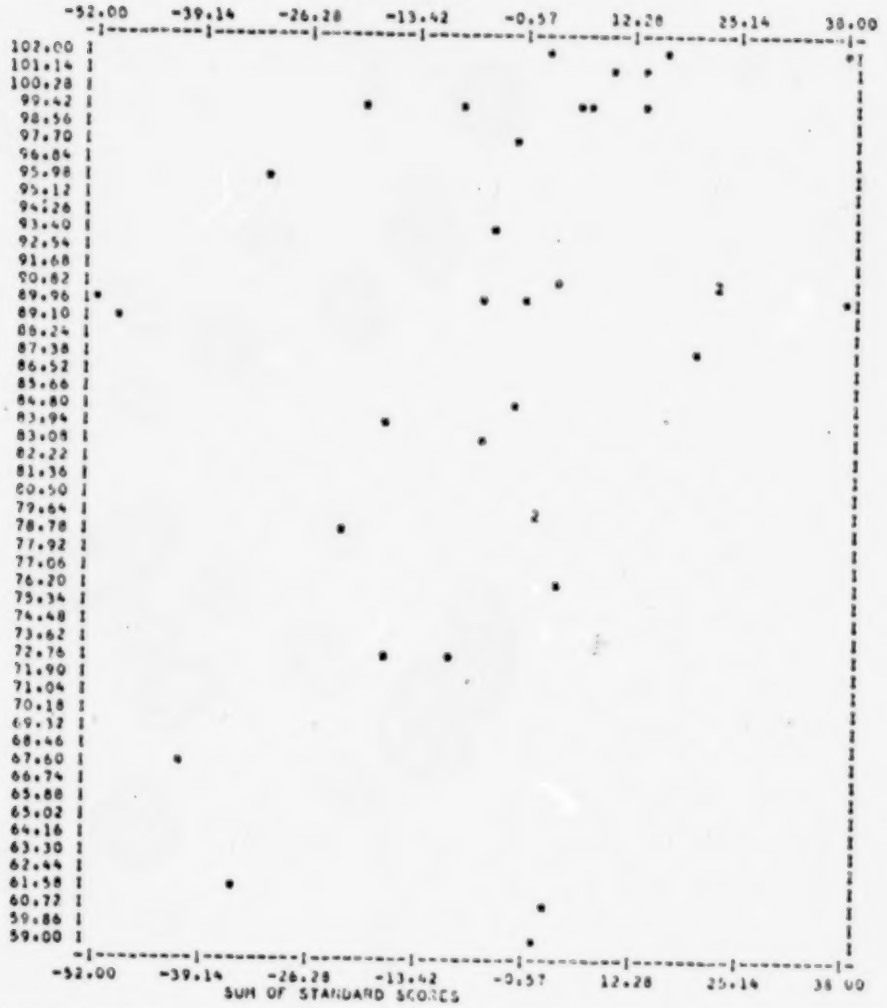
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9/18/72

COMPLIANCE ANALYSIS SYSTEM - PAIRWISE PLOT

UNADJUSTED TOTAL RATING SCORE
VS
SUM OF STANDARD SCORES



BASE IS INSTRUMENT MEN
NUMBER OF EMPLOYEES = 35

CORRELATION = 0.338

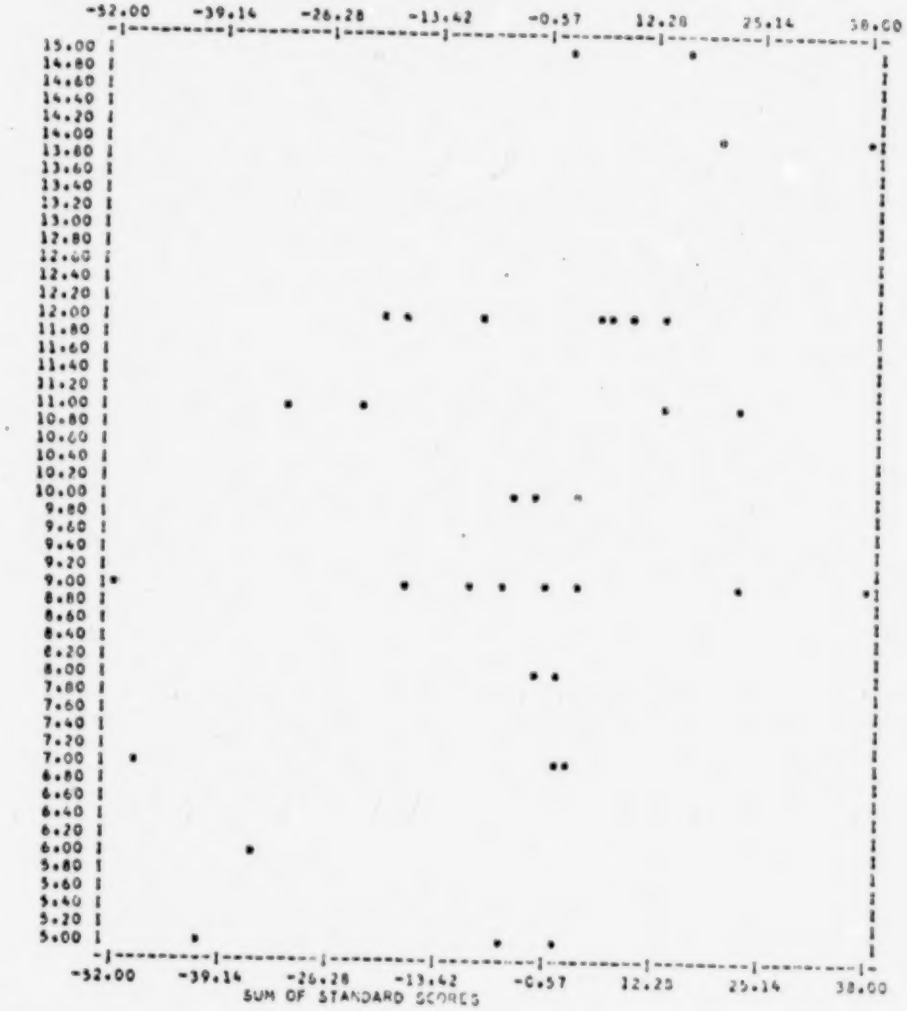
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THE DETROIT EDISON COMPANY

9/18/72

COMPLIANCE ANALYSIS SYSTEM - PAIRWISE PLOT

ADJUSTED TOTAL RATING SCORE
VS
SUM OF STANDARD SCORES



BASE IS INSTRUMENT MEN
NUMBER OF EMPLOYEES = 35

CORRELATION = 0.412

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CORRELATION ANALYSIS FOR SPECIFIED VARIABLES

VAR.NO.	VARIABLE NAME
1	YEARS OF EXPER.
2	PERS. (RAW)
3	PERS. CORRECTED FOR AGE
4	MPFB
5	EPSAT-MATH
6	EPSAT-FORM
7	EPSAT-PHYS. SCI. COMP.
8	EPSAT-ARITH. MEAS.
9	EPSAT-VERB. COMP.
10	EPSAT-MECH. COMP.
11	EPSAT TOTAL
12	PERS. CORRECTED FOR AGE (STD. SCORE)
13	MPFB (STD. SCORE)
14	EPSAT TOTAL (STD. SCORE)
15	UNADJUSTED TOTAL RATING SCORE
16	ADJUSTED TOTAL RATING SCORE
17	SUM OF STANDARD SCORES
18	MULTIPLE REGRESSION RESULTANT

BASE IS INSTRUMENT MEN

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	
2799	1	23	26	49	9	4	0	5	8	13	39	-2	8	-15	73	9	-9	
3354	1	30	30	43	14	6	1	4	21	13	59	6	1	-6	59	5	1	
3618	1	26	26	33	5	3	15	1	26	13	63	-2	-11	-4	73	9	-17	
3887	1	25	28	53	19	1	15	6	20	21	82	2	13	4	87	14	19	1
2853	1	28	31	45	5	1	15	0	12	10	51	0	4	-9	76	10	3	
2576	1	20	23	38	5	3	9	2	26	6	51	-8	-5	-9	73	11	-24	
2800	1	24	25	45	3	0	3	0	15	13	34	-4	6	-17	84	12	-17	
3555	1	23	23	43	20	10	17	4	22	21	94	-8	1	9	61	7	1	1
3397	2	24	24	41	12	5	21	14	4	18	74	-6	-1	1	90	9	-6	1
3554	2	22	22	39	3	3	9	5	17	21	58	-10	-4	-6	99	12	-20	
2746	2	27	27	40	17	4	19	8	14	15	77	0	-2	2	98	8	9	1
2488	2	26	31	48	9	6	21	4	30	18	88	6	7	7	91	11	22	1
2682	2	30	34	47	13	5	33	5	38	21	115	14	6	18	102	14	33	1
3158	2	13	16	35	5	2	17	0	20	16	60	-22	-8	-5	62	6	-35	
3157	10	15	19	40	3	4	11	1	9	15	43	-16	-2	-13	56	11	-31	
2877	12	25	28	45	9	6	17	5	19	16	72	2	4	0	99	12	6	1
2877	12	23	26	41	5	5	13	7	15	16	61	-2	-1	-5	98	12	-8	
3020	12	35	38	41	10	2	35	5	36	21	109	22	-1	16	90	9	37	1
1508	15	21	25	38	8	2	24	2	31	13	80	-4	-5	3	83	5	-6	
2090	15	29	32	43	10	4	32	5	19	14	84	10	1	5	102	15	16	
2215	15	22	25	40	7	2	24	5	25	20	83	-4	-2	5	96	9	-1	1
719	20	9	13	38	2	0	6	4	7	9	28	-28	-5	-19	90	9	-52	
989	20	12	17	32	1	1	13	2	11	6	34	-20	-12	-17	69	7	-69	
1229	20	19	22	54	12	0	15	4	9	13	53	-10	15	-8	93	10	-4	
1568	20	28	31	36	11	5	19	3	30	18	86	8	-7	6	99	12	7	
2870	3	22	25	41	8	3	24	6	32	19	92	-4	-1	8	91	9	3	
3007	3	28	28	42	15	7	27	4	23	21	97	2	0	11	99	11	13	
2520	4	23	23	44	16	6	21	4	24	17	70	-8	2	6	102	13	2	
3208	4	27	27	39	6	4	11	5	31	19	76	0	-4	2	85	7	-7	
3394	4	25	25	50	9	3	15	4	14	18	63	-4	9	-6	80	7	1	
3592	4	27	30	33	13	8	31	6	25	19	106	6	-11	14	101	12	9	1
3220	5	22	27	21	11	2	18	0	7	5	35	0	-25	-16	66	5	-41	
2201	5	22	28	49	7	8	31	5	29	21	99	2	8	12	91	9	22	
3416	5	26	26	48	10	2	21	9	31	18	91	-2	7	8	101	12	13	
1698	6	25	25	36	7	7	28	8	26	18	94	-4	-7	9	97	10	-2	

BASE IS INSTRUMENT MEN

PREPARED BY —
NATIONAL COMPLIANCE COMPANY
9/18/72

Respondent's Exhibit No. 15

THE MULTI-APTITUDE TEST
Form A

Edward F. Cureton, Lenore Haimes Catalog, and
Lyda Bateman, Everett J. Fisher, Thomas P. Gilbert, Joseph C. Hammock, Herbert C. Hayward, Frederick H. Kling, Joel Muchnow, Raymond M. Shrader, Paschal N. Strong, Arvold H. Whitlock, Paul G. Whitmore, S. Leon Williams, Warren B. Willingham

NAME _____ DATE _____
Last First Middle

AGE _____ SEX _____ A _____

B _____ C _____

PART	SCORE
I. Vocabulary	
II. General Information	
III. Arithmetic	
IV. Number Series	
V. Figure Classification	
VI. Mechanical Comprehension	
VII. Word Recognition	
VIII. Scrambled Letters	
IX. Checking	
X. Paper Form Board	

GENERAL DIRECTIONS

This test consists of ten parts measuring different aptitudes and abilities. Each part has its own time limit. The time limits are short. *Work on each part only during the time allowed for it.* If you finish a part before time is called, go back and check your work on that part. *Do not* return to a previous part, or go ahead to a later part. Work *rapidly* on each part, but try not to make mistakes.

Each part has its own special directions, and one or two examples, correctly marked. Be sure you understand the directions for each part *before* you start to work on it. The examiner will *not* answer any questions after the starting signal for a part has been given.

DO NOT TURN THE PAGE UNTIL YOU ARE TOLD TO DO SO.

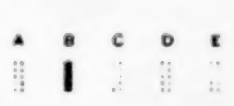
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I. VOCABULARY

Each test word, in capital letters, is followed by five possible answers. The correct answer is the word which *means most nearly the same* as the test word. Make a *heavy* line with your pencil between the pair of dotted lines at the right which are lettered the same as the correct answer. EXAMPLE:

FREQUENT: A) always B) often C) never D) very E) soon



"Often" means most nearly the same as "frequent," so a heavy line has been made between the dotted lines at the right under B.

Mark an answer for every word. If you don't know the meaning of a word, make the best choice you can.

You will have *three minutes* to work on this test.

DO NOT TURN THE PAGE UNTIL YOU ARE TOLD TO DO SO.

EXTRAVAGANT: A) exclusive B) prodigious C) truant D) covetous E) excessive — A B C D E

HOMAGE: A) fodder B) toll C) allegiance D) foolishness E) fervor — A B C D E

IMMERSE: A) suspend B) anoint C) disclose D) submerge E) originate — A B C D E

ALIENATE: A) impoverish B) estrange C) dissipate D) conciliate E) deprecate — A B C D E

GARNISH: A) wield B) harrow C) toughen D) beautify E) degrade — A B C D E

PRECARIOUS: A) intimate B) wary C) invaluable D) perilous E) adventurous — A B C D E

DIABOLIC: A) disrupting B) dictatorial C) demented D) fiendish E) angelic — A B C D E

SAVOUR: A) relish B) poise C) balm D) fragrance E) prudence — A B C D E

QUAIL: A) recoil B) stimulate C) rout D) whiten E) decry — A B C D E

IMBUE: A) distort B) refute C) abstain D) inoculate E) allege — A B C D E

AFFRONT: A) opulence B) admittance C) reversion D) deception E) indignity — A B C D E

ANTIPATHY: A) animosity B) discomfiture C) sobriety D) clemency E) negation — A B C D E

WILE: A) frontier B) stealth C) force D) verdure E) stratagem — A B C D E

LEVITY: A) assessment B) brevity C) solemnity D) nobility E) annihilation — A B C D E

DROLL: A) apprehensive B) obtuse C) pitiable D) ludicrous E) listless — A B C D E

II. GENERAL INFORMATION

Each problem consists of a question or an incomplete sentence, followed by four possible answers. Choose the answer which *best* answers the question or completes the sentence, and put a cross in the box at the right which is lettered the same as the answer you have chosen. EXAMPLE:

Sausage is ordinarily made from

A) beef B) mutton
C) pork D) venison

A	B	C	D
☐	☐	☒	☐

Sausage is ordinarily made from pork, so a cross has been put in the box at the right under C.

If you don't know the answer to a problem, make the best choice you can. Leave it blank only if you have no hunch whatever about any of the answers.

You will have *two minutes* to work on this test.

DO NOT TURN THE PAGE UNTIL YOU ARE TOLD TO DO SO.

Scrooge appears in
A) Henry IV B) Vanity Fair
C) Canterbury Tales D) The Christmas Carol

A	B	C	D
☐	☐	☐	☐

Coral is found in
A) reefs B) mines C) oysters D) elephants

A	B	C	D
☐	☐	☐	☐

The Amazon lies chiefly in
A) Chile B) Brazil C) Bolivia D) Argentina

A	B	C	D
☐	☐	☐	☐

Which is a chemical element?
A) salt B) steel C) brass D) mercury

A	B	C	D
☐	☐	☐	☐

A fuse is used primarily for
A) speed B) safety C) economy D) efficiency

A	B	C	D
☐	☐	☐	☐

The most prominent industry of Chicago is
A) steel B) textiles C) packing D) automobiles

A	B	C	D
☐	☐	☐	☐

Bile is secreted by the
A) liver B) spleen C) kidneys D) pancreas

A	B	C	D
☐	☐	☐	☐

Which of these is *not* a trade name?
A) stetson B) frigidaire
C) scotch tape D) ginger ale

A	B	C	D
☐	☐	☐	☐

The rutabaga is a
A) fish B) tree C) lizard D) vegetable

A	B	C	D
☐	☐	☐	☐

Which countries are most closely associated with the development of the ballet?
A) France and England B) France and Russia
C) Germany and Russia D) England and the U.S.

A	B	C	D
☐	☐	☐	☐

Which was settled first?
A) Boston B) Santa Fe
C) Plymouth Rock D) St. Augustine

A	B	C	D
☐	☐	☐	☐

With what architectural form is the "flying buttress" associated?
A) Gothic B) Georgian
C) Egyptian D) Romanesque

A	B	C	D
☐	☐	☐	☐

The creel is used in
A) hunting B) fishing
C) dancing D) sculpturing

A	B	C	D
☐	☐	☐	☐

Frank Lloyd Wright is noted for his work in
A) politics B) aviation
C) sculpture D) architecture

A	B	C	D
☐	☐	☐	☐

What is the final stage in passing an amendment to the constitution?
A) state ratification B) presidential signature
C) congressional action D) supreme court decision

A	B	C	D
☐	☐	☐	☐

STOP. GO BACK AND CHECK YOUR WORK.

III. ARITHMETIC

Perform the indicated operations for each problem, and write the answer in the space provided for it. Use the margin for figuring whenever necessary. In all problems involving fractions, reduce your answers to MIXED NUMBERS, with the fraction parts in their LOWEST TERMS. EXAMPLE:

$$\begin{array}{r} 1\frac{3}{4} \\ -\ 2\frac{3}{4} \\ \hline \end{array}$$

$4\frac{1}{2}$

The answer MUST be $4\frac{1}{2}$. NOT $4\frac{2}{4}$ or $-\frac{18}{4}$ or $\frac{9}{2}$.

You will have *four minutes* to work on this test.

DO NOT TURN THE PAGE UNTIL YOU ARE TOLD TO DO SO.

$$\begin{array}{r} 88 \\ 54 \\ +\ 79 \\ \hline \end{array}$$

$$\begin{array}{r} 611 \\ -\ 335 \\ \hline \end{array}$$

$$\begin{array}{r} 37 \\ \times\ 64 \\ \hline \end{array}$$

$$\begin{array}{r} 6.9 \\ 5.2 \\ \hline \end{array}$$

3. $98 \overline{)9016}$

6. $.39 \overline{)3.003}$

7. $5\frac{3}{4} - 8\frac{7}{8}$

8. $5\frac{1}{3} - 2\frac{2}{3}$

$3\frac{3}{4} \quad 1\frac{1}{3} \quad 1\frac{1}{4}$

$7\frac{1}{2} \quad 3 \quad 1\frac{1}{5}$

STOP AT THIS PAGE AND CHECK NOW IF WORK

IV. NUMBER SERIES

Each problem consists of a series of six numbers formed according to some rule. You are to find the rule, and then write the next *two* numbers of the series on the lines at the right. EXAMPLES:

1.	12	12	9	9	6	6	3	3

In this example the rule was to write each number twice, and to subtract 3 from the number of each pair to get the number of the next pair.

2.	− 2	4	−6	8	−10	12	−14	16

Here the rule was to add 2 to each number to get the next one, and to give a minus sign to every other number.

You will have *four minutes* to work on this test.

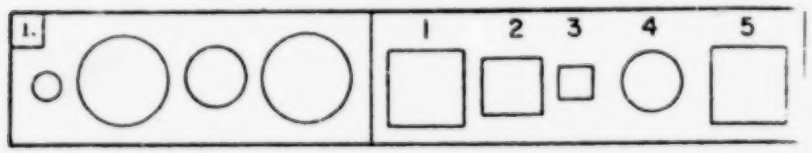
DO NOT TURN THE PAGE UNTIL YOU ARE TOLD TO DO SO.

3	2	2	2	1	1	____	____
5	6	8	9	11	12	____	____
1	$\frac{2}{3}$	$\frac{3}{4}$	$\frac{4}{5}$	$\frac{5}{6}$	$\frac{6}{7}$	____	____
91	82	73	64	55	46	____	____
0	9	7	4	0	−5	____	____
63	48	35	24	15	8	____	____
2	3	6	5	$1\frac{1}{2}$	$1\frac{1}{4}$	____	____
25	$\frac{1}{625}$	125	$\frac{1}{125}$	25	$\frac{1}{25}$	____	____
3	− 7	10	11	19	−25	____	____
41	19	−36	25	16	−9	____	____

STOP GO BACK AND CHECK YOUR WORK.

V. FIGURE CLASSIFICATION

In each problem there are four figures at the left, all alike in some way, and numbered figures at the right. Find the one at the right which goes with the ones at the left, and write its *number* on the line at the far right of the box. EXAMPLE



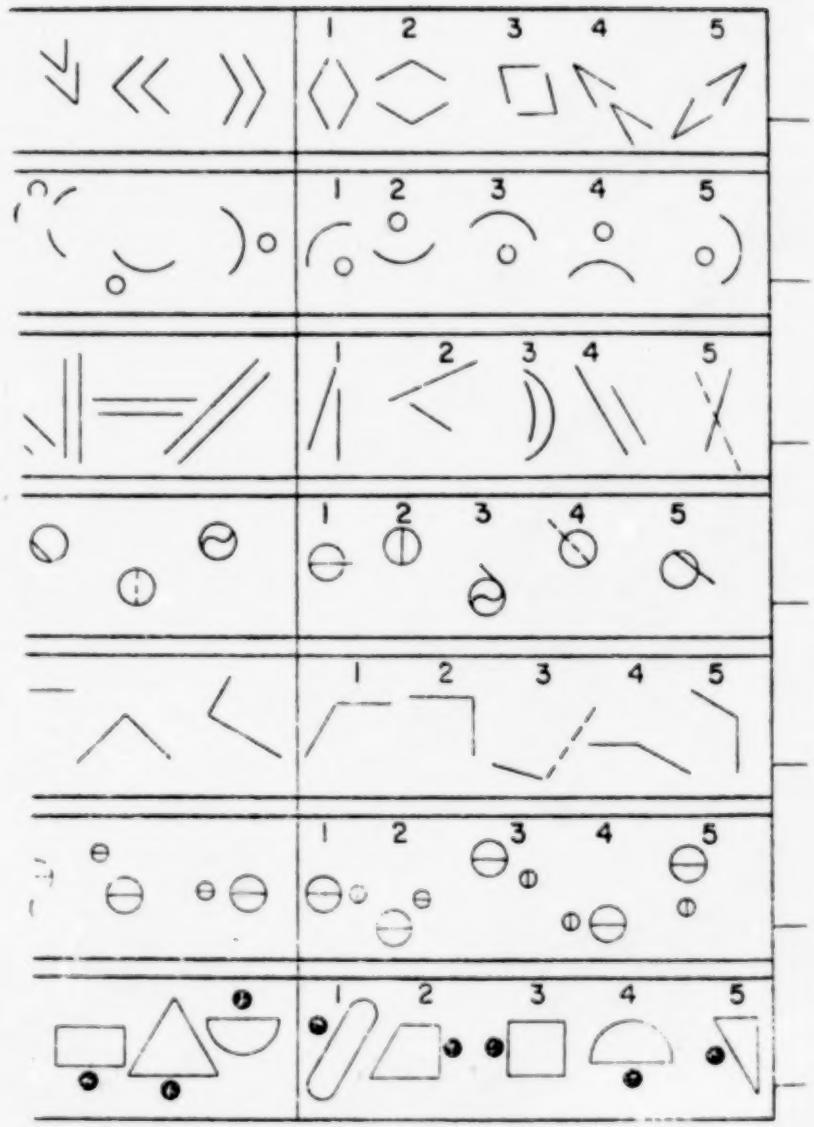
The figures at the left are round, and all but one of those at the right are square. Number 4 at the right is round, however, so it goes with those at the left, and 4 has been written on the line at the far right.

The answer to this example is 5, because all the lines at the left are straight, and all the lines at the right are curved except 5.

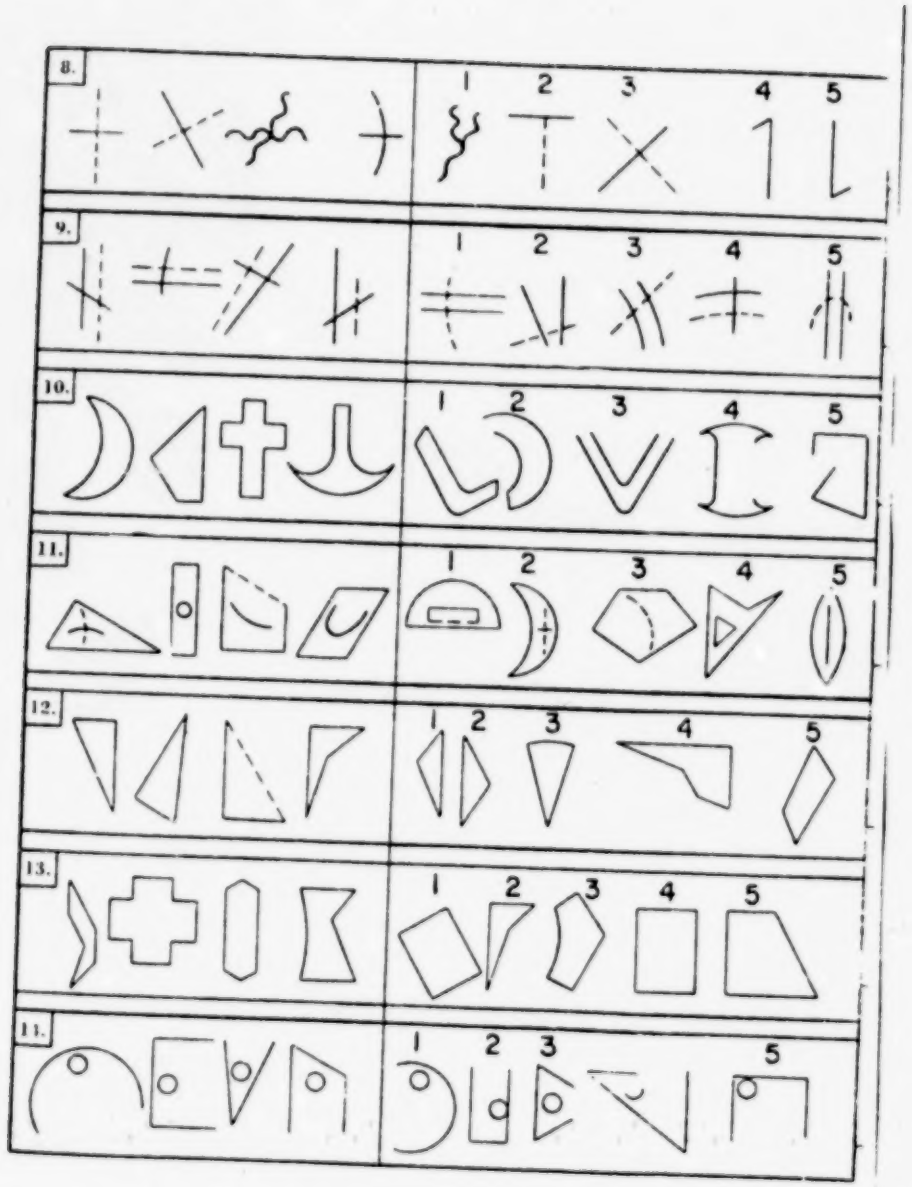
Mark an answer for every problem. If you don't know the answer to a problem, make the best choice you can.

You will have *four minutes* to work on this test.

DO NOT TURN THE PAGE UNTIL YOU ARE TOLD TO DO SO.



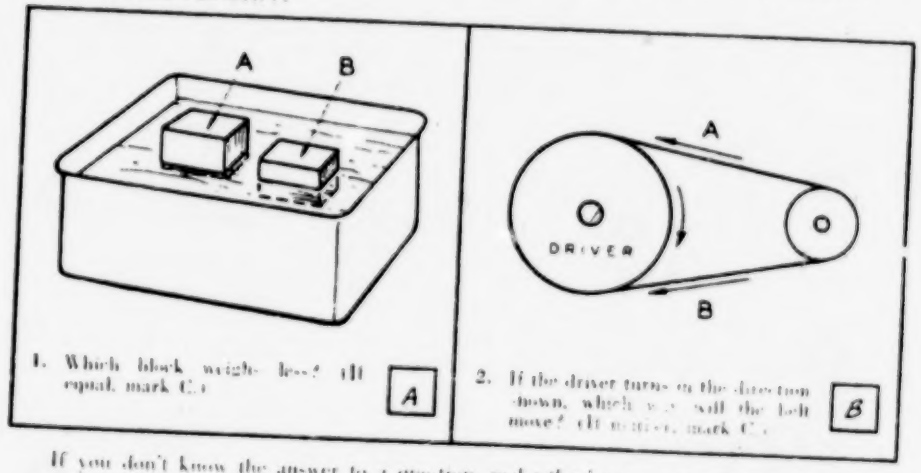
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STOP. GO BACK AND CHECK YOUR WORK.

VI. MECHANICAL COMPREHENSION

Each problem consists of a picture with a question under it. PRINT the CAPITAL LETTER of the correct answer in the box at the right of the question. EXAMPLES (with correct answers):



1. Which block weighs less? (If equal, mark C.) **A**

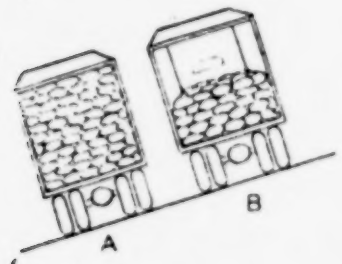
2. If the driver turns in the direction shown, which way will the belt move? (If neither, mark C.) **B**

If you don't know the answer to a question, make the best guess you can. Leave it blank only if you have no hunch whatever about any of the answers.

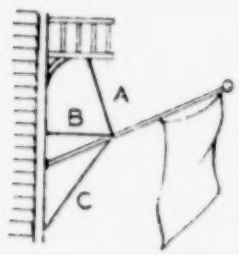
You will have *four minutes* to work on this test.

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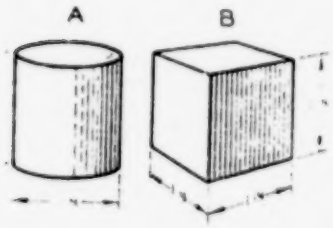
Adapted with permission from selections from the Wiesen Test of Mechanical Aptitude. Copyright © by The Psychological Corporation.



...ch truck is more apt to turn ...? (If equal, mark C.)



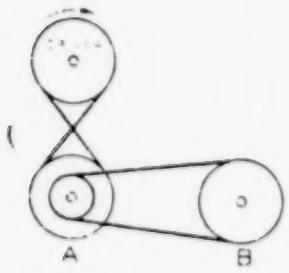
2. Which wire below it will not hold up the flagpole?



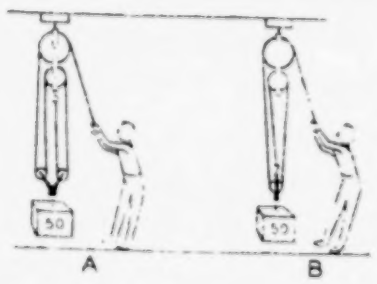
...ich weighs more? (If equal, ...k C.)



4. If the canoe is moving forward, which way will it go when the front man *holds* his paddle in the water in the position shown?

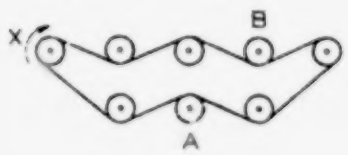


...ich wheel turns in the same di...tion as the driver? (If neither, ...k C.)

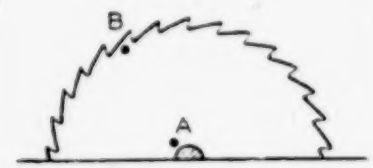


6. Which man must pull in more rope to raise the box the same distance? (If equal, mark C.)

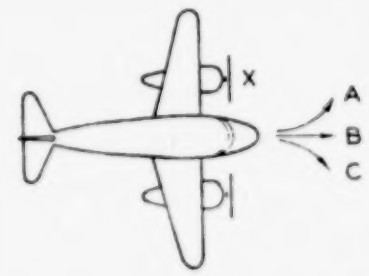
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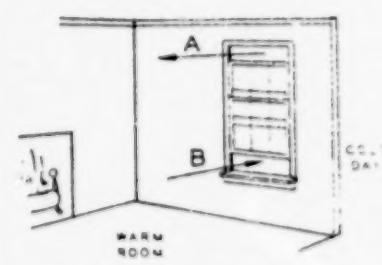
7. Which wheel (A or B) turns in the same direction as X? (If neither, mark C.)



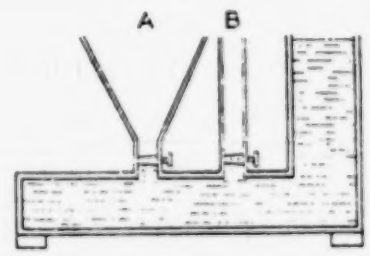
8. Which spot will move slower as the saw turns? (If equal, mark C.)



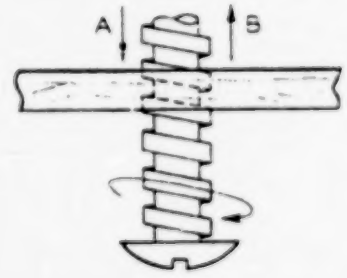
9. When the engine at X is out of order, which way will the plane tend to go?



10. Which way will the air move? (If neither, mark C.)



11. In which container (A or B) will the water rise higher when the valves are opened? (If equal, mark C.)



12. If the bolt is screwed in the direction shown, which way will it move? (If neither, mark C.)

STOP. GO BACK AND CHECK YOUR WORK.

VII. WORD RECOGNITION

Each question consists of a *very common* word which has been partly erased. Try to decide what the word is, and PRINT it on the line at the right. EXAMPLE:



If you don't recognize a word, make the best guess you can. Leave the line blank only if you have no hunch whatever.

You will have *five minutes* to work on this test.

DO NOT TURN THE PAGE UNTIL YOU ARE TOLD TO DO SO.

1. _____
2. desire _____
3. finish _____
4. mir_ _____
5. V_ _____
6. f_ _____
7. _____
8. _____
9. _____
10. _____
11. _____
12. _____
13. _____
14. _____
15. _____
16. _____
17. _____

STOP. GO BACK AND CHECK YOUR WORK.

VIII. SCRAMBLED LETTERS

Each problem consists of a *very common* five-letter word, but the letters have be- scrambled. You are to try to find the correct word, and PRINT it on the line at th right. EXAMPLE:

VEOBA__ABOVE_____

The letters V E O B A can be rearranged to form the word ABOVE.

You will have *five minutes* to work on this test.

DO NOT TURN THE PAGE UNTIL YOU ARE TOLD TO DO SO.

1. EHILW _____
2. EWTRI _____
3. WORBN _____
4. TEHWI _____
5. BILUT _____
6. ADEHR _____
7. AERTW _____
8. CRYAR _____
9. LAYID _____
10. DENRU _____
11. ARTGN _____

STOP. GO BACK AND CHECK YOUR WORK.

IX. CHECKING

Each problem consists of a pair of names or a pair of numbers. If they are exactly the same, PRINT a CAPITAL **S** on the line between them. If they are different in any way, PRINT a CAPITAL **D** on the line between them. EXAMPLES (correctly marked):

1. 80172 **D** 80192
2. Jones Co. Ltd. **S** Jones Co. Ltd.
3. 314250 **S** 314250
4. Paul L. Kelley **D** Paul L. Kelly

This is a speed and accuracy test. You will have *one minute* to work on it.

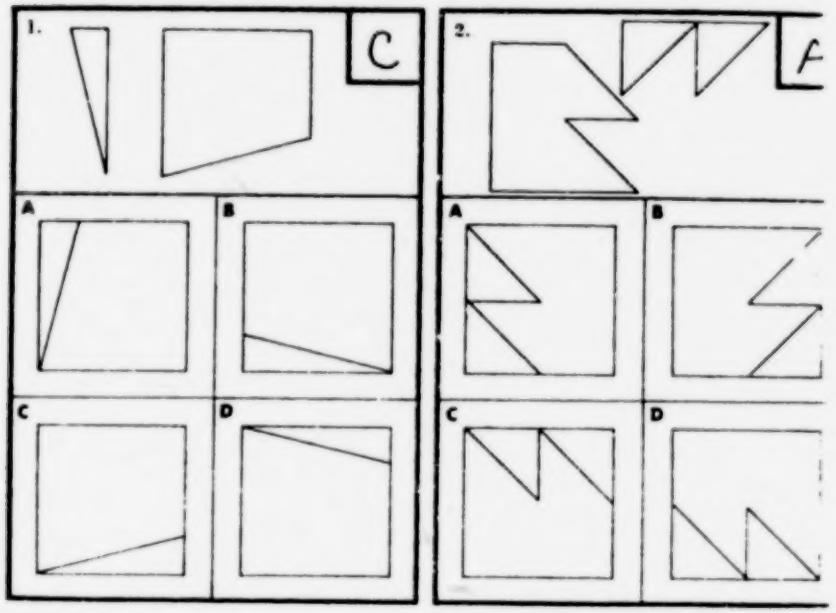
DO NOT TURN THE PAGE UNTIL YOU ARE TOLD TO DO SO.

1. 23157 _____ 23157
2. C. J. Gamble _____ C. J. Gambel
3. 147813 _____ 147313
4. Lee, Lewis _____ Lee, Lewis
5. 72633 _____ 72933
6. Armstrong Boynton Inc. _____ Armstrong Boyton Inc.
7. 8379986 _____ 8379936
8. G. W. Reaves _____ G. W. Reeves
9. 350185 _____ 350185
10. Witt Wiring Service _____ Witt Wiring Service
11. 744818 _____ 744818
12. Cox-Baker and McAuley _____ Cox-Baker and McCauley
13. 9719231 _____ 9716231
14. J. R. Chase _____ J. R. Chase
15. 32401 _____ 32401
16. Microtone _____ Macrotone
17. 94051 _____ 94051
18. Trane Air Conditioning _____ Trane Air Conditioning
19. 143391 _____ 143491
20. John C. Gravis _____ John C. Graves
21. 37948 _____ 32948
22. Willock Groc. Mkt. _____ Willock Groc. Mkt.
23. 03775 _____ 03275
24. Dixisteel _____ Dixiesteel
25. 1391193 _____ 1392193
26. Graham's Variety Shop _____ Graham's Variety Shop
27. 6620127 _____ 6620127
28. P. V. Zirkle _____ P. V. Zirkel
29. 7926551 _____ 7929551
30. D. Victor Zanet _____ D. Victor Zanet

STOP. GO BACK AND CHECK YOUR WORK.

X. PAPER FORM BOARD

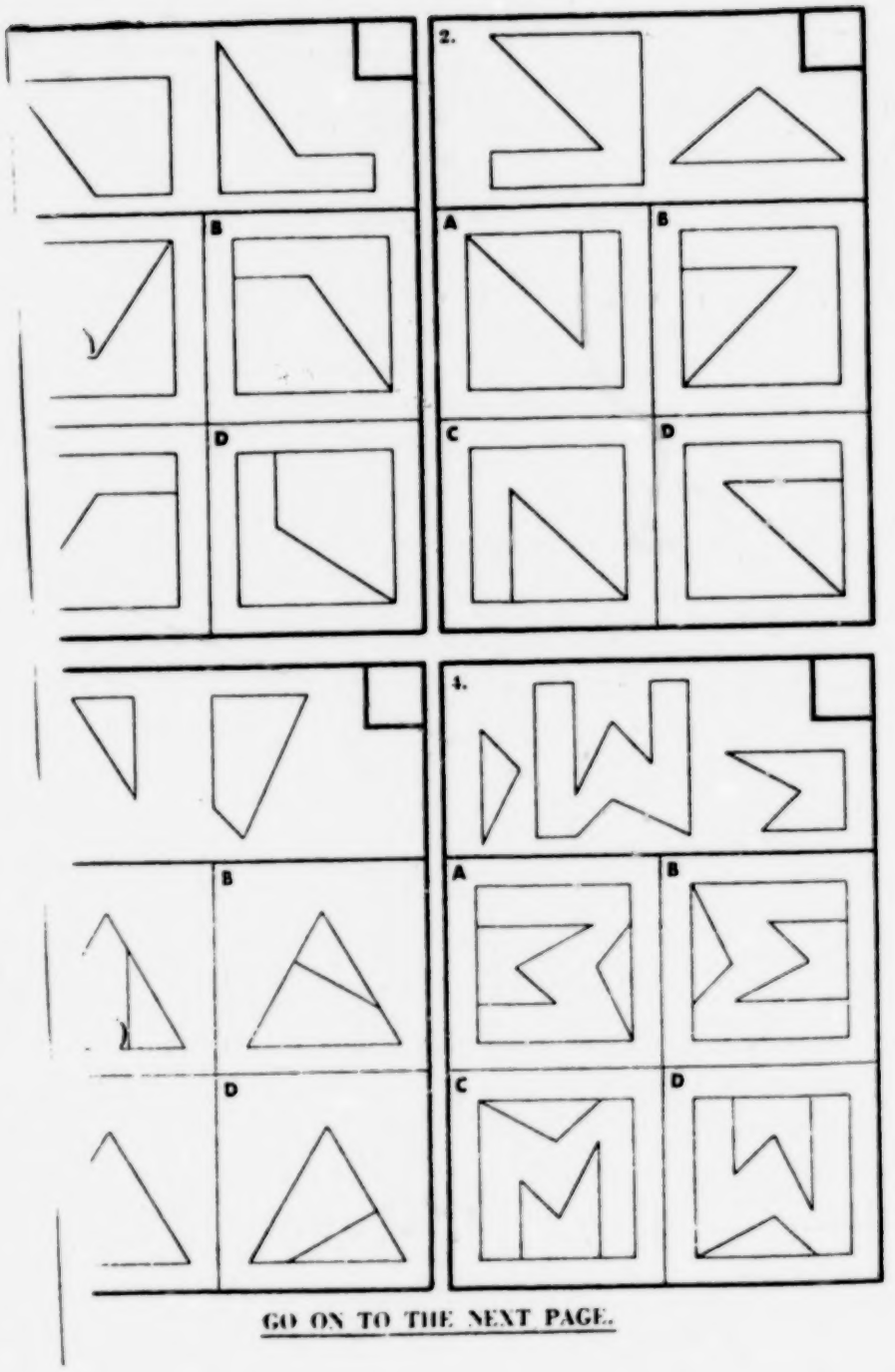
In each problem, think of the figures in the upper section as the pieces of a jigsaw puzzle. They can be slid around, but they *cannot* be turned over. If you slide them around, they will fit together to make one of the four figures, A or B or C or D, below. PRINT the CAPITAL LETTER of that figure in the upper right corner. EXAMPLES (with correct answers):



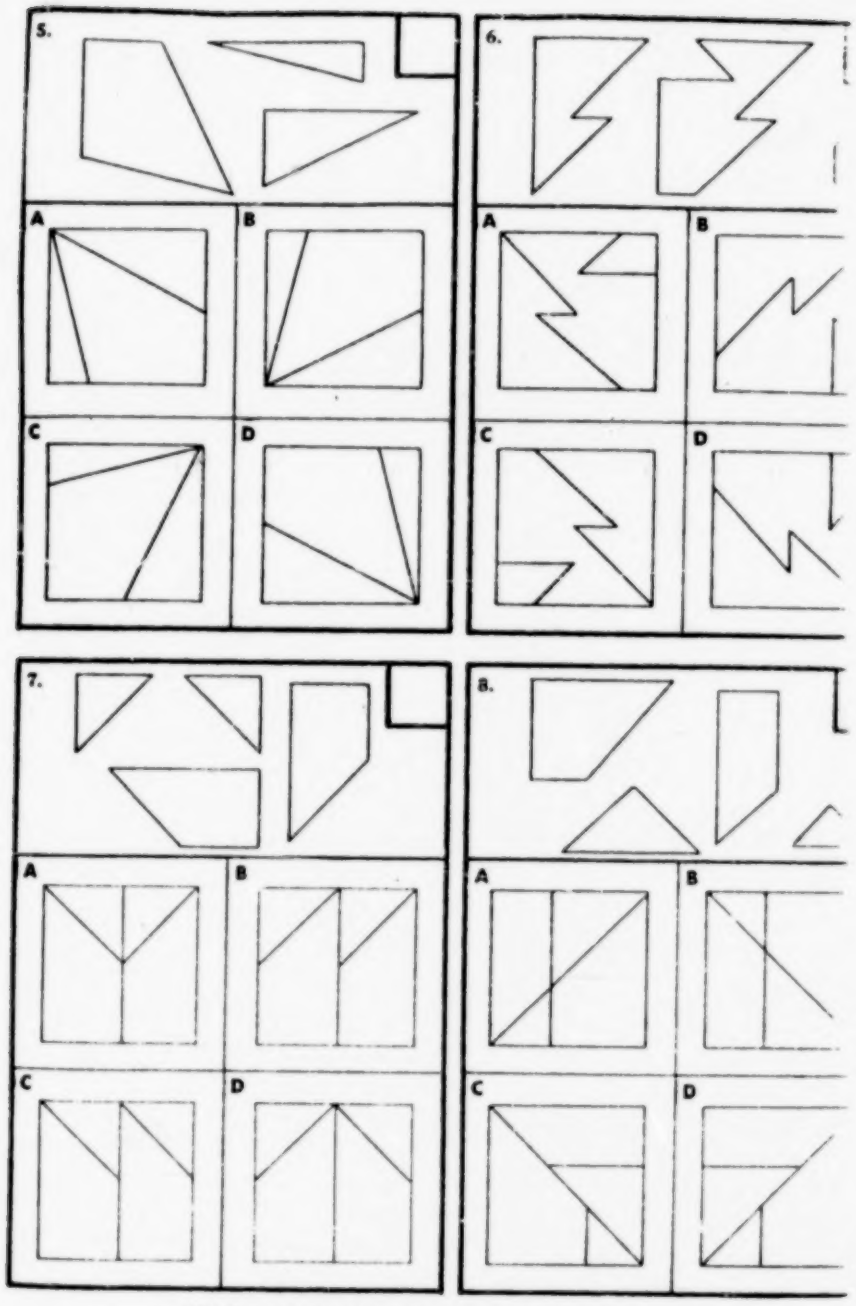
Mark an answer for every problem. If you don't know the answer to a problem, make the best choice you can.

You will have three minutes to work on this test.

DO NOT TURN THE PAGE UNTIL YOU ARE TOLD TO DO SO.



GO ON TO THE NEXT PAGE.



STOP. GO BACK AND CHECK YOUR WORK.

Respondent's Exhibit No. 16

PART II: FORMULATION

(Time 10 minutes one page)

Directions: In this part you are to read each statement or short paragraph and do what it tells you to do. In most cases this involves writing an algebraic expression for what the statement says. As in Part I, select the correct answer from among the five choices and record your answer by filling in the space between the dotted lines under the letter of the correct choice on the answer sheet. Study the samples:

Sample:

X. If x is a number, twice that number would be expressed algebraically as:

(A) x (B) x^2 (C) $2x$ (D) $2x^1$ (E) $4x$

Y. If x and y represent two numbers, their sum would be expressed as:

(A) $x+y$ (B) xy (C) $x-y$ (D) $x^1 y^2$ (E) $\frac{x}{y}$

PART III: PHYSICAL SCIENCE COMPREHENSION

(Time 10 minutes, one page)

Directions: Examine each statement below and decide whether it is true or false. If the statement is true, fill in the space under T on the answer sheet. If the statement is false, fill in the space under F.

Samples: X. Iron is a metal.
Y. Water is a solid.

Iron *is* a metal; so the space under T has been filled in on the answer sheet for Sample X.

Water is a liquid, not a solid. Therefore, the space under F has been filled in for Sample Y.

Part IV: Arithmetic Reasoning

(Time 15 minutes, one page)

Directions: Solve these problems. Use the extra sheet of paper provided for any figuring you need to do.

1. If 2 apples cost 10 cents, how many cents will 3 apples cost?

   (A) 5 (B) 10 (C) 15 (D) 25 (E) 30

2. If a car travels 80 miles in 2 hours, how many hours are required for a trip of 240 miles?

   (A) 3 (B) 4 (C) 5 (D) 6 (E) 7

Respondent's Exhibit No. 17

Instructions for Part III

On the next several pages you will be given some problems in arithmetical reasoning. After each problem there are five answers, but only one of them is the correct answer. You are to solve each problem and indicate which answer you think is correct by marking the proper space on the answer sheet. The following problems have been done correctly. Study them carefully.

Example X: How many apples can you buy for 60 cents at the rate of 3 for 10 cents?

(a) 6 (b) 12 (c) 18 (d) 20 (e) 30

The correct answer to the problem is 18, which is (c); therefore the space under the letter (c) on the separate answer sheet has been filled in.

Example Y: In 5 weeks John has saved $3.50. What have his average weekly savings been?

(a) 35¢ (b) 40¢ (c) 50¢ (d) 70¢ (e) 80¢

The correct answer to the above problem is 70¢; accordingly, choice (d) has been marked as the correct answer on the answer sheet.

When you are told to begin, turn the page immediately and begin to work. When you finish one page, go on to the next. Both speed and accuracy are important. You will be allowed 30 minutes, but you may not be able to finish in the time allowed.

Do Not Turn This Page Until You Are Told To Begin

Part III: Arithmetic Reasoning

1. If the total area of a picture measuring 10 inches by 12 inches plus a matting of uniform width surrounding the picture is 224 square inches, the width of the matting is

(A) 2 inches
(B) 2 4/11 inches
(C) 3 inches
(D) 4 inches
(E) 5 inches.

2. The net price of a $25 item after successive discounts of 20% and 30% is

(A) $11.00
(B) $12.50
(C) $14.00
(D) $19.00
(E) $21.00.

3. The cost of 63 inches of ribbon at $.12 per yard is

(A) $.20
(B) $.21
(C) $.22
(D) $.23
(E) $.24.

4. If 1½ cups of cereal are used with 4½ cups of water, the amount of water needed with ¾ of a cup of cereal is

(A) 2 cups
(B) 2⅛ cups
(C) 2¼ cups
(D) 2½ cups
(E) 2¾ cups.

5. Under certain conditions, sound travels at about 1100 ft. per second. If 88 ft. per second is approximately equivalent to 60 miles per hour, the speed of sound, under the above conditions, is, of the following, closest to

(A) 730 miles per hour
(B) 740 miles per hour
(C) 750 miles per hour
(D) 760 miles per hour
(E) 770 miles per hour

6. If shipping charges to a certain point are 62 cents for the first five ounces and 8 cents for each additional ounce, the weight of a package for which the charges are $1.66 is

(A) 13 ounces
(B) 1⅛ pounds
(C) 1¼ pounds
(D) 1½ pounds
(E) 1¾ pounds.

7. If 15 cans of food are needed for seven men for two days, the number of cans needed for four men for seven days is

(A) 10
(B) 15
(C) 20
(D) 25
(E) 30.

8. An automobile traveled 6 hours at an average speed of 40 miles per hour. It averaged only 30 miles per hour on the return trip. What was the average speed per hour, to the nearest mile, for the round trip?

(A) 34 mph
(B) 35 mph
(C) 36 mph
(D) 37 mph
(E) 38 mph.

9. A gallon of water is equal to 231 cubic inches. How many gallons of water are needed to fill a fish tank that measures 11″ high, 14″ long and 9″ wide?

(A) 6 gal.
(B) 8 gal.
(C) 9 gal.
(D) 14 gal.
(E) 15 gal.

10. A savings and loan association pays 4% interest which is compounded quarterly. At this rate, what is the interest on $600 for one quarter?

(A) $4
(B) $6
(C) $24
(D) $60
(E) $75.

11. A carpenter needs boards for 4 shelves, each 2′9″ long, and ½″ thick. How many feet of board should he buy?

(A) 11
(B) 11 1/6
(C) 13
(D) 15½
(E) 18.

12. Assuming that on a blueprint ⅛ inch equals 12 inches of actual length, the actual length in feet of a steel bar represented on the blueprint by a line 3¾ inches long is

(A) 3¾
(B) 30
(C) 45
(D) 180
(E) 360.

13. In a circle graph a segment of 108 degrees is shaded to indicate the overhead in doing $150,000 gross business. The overhead amounts to

(A) $1,200
(B) $4,500
(C) $12,000
(D) $45,000
(E) $90,000.

14. The Baltimore Colts won 8 games and lost 3. The ratio of games won to games played is

(A) 8 : 11
(B) 3 : 11
(C) 8 : 3
(D) 3 : 8
(E) 11 : 3.

15. The average of a series of numbers is 34 and their sum is 510. How many numbers are there in the series?

(A) 15
(B) 34
(C) 60
(D) 510
(E) Cannot be determined from the given data.

16. A bank president receives 8 times as much salary as one of the messenger boys. If the sum of their salaries is $13,500, the president's salary is

(A) $ 8,500
(B) $10,000
(C) $12,000
(D) $12,500
(E) $13,000.

17. A bridge cable, 500 feet long when the temperature was 60 degrees Fahrenheit, expanded 0.3% when the temperature rose to 90 degrees Fahrenheit. It increased

(A) .15 ft.
(B) 1.5 ft.
(C) 15 ft.
(D) 501.5 ft.
(E) 505 ft.

18. If there are 10 mills in a cent, a tax of 43.2 mills per dollar on property assessed at $12,500 is

(A) $5400
(B) $54
(C) $540
(D) $5.40
(E) None of these.

19. A single discount equivalent to two successive discounts of 12½% and 20% is

(A) 30%
(B) 16¼%
(C) 32½%
(D) 22½%
(E) 20%.

20. The number of square tiles each 8 inches on a side needed to cover a rectangular area 12 feet by 16 feet is

(A) 36
(B) 3
(C) 432
(D) 864
(E) 960.

21. An alloy is composed of 49.2% bismuth, 12.3% tin, 24.6% lead, and the remainder cadmium. In making a circle graph to show this composition, the number of degrees in the sector for cadmium is approximately

(A) 31
(B) 25
(C) 14
(D) 50
(E) 60.

22. If an automobile travels 80 miles at the rate of 20 miles per hour and then returns over the same route at the

rate of 40 miles per hour, the average speed per hour for the entire trip (going and return) is

(A) 30 miles
(B) 26⅔ miles
(C) 60 miles
(D) 33⅓ miles
(E) 40 miles.

23. The smaller angle between the hands of a clock at 3:30 is

(A) 105°
(B) 75°
(C) 90°
(D) 60°
(E) 80°.

24. If one-third of the liquid contents of a can evaporates on the first day and three-fourths of the remainder evaporates on the second day, the fractional part of the original contents remaining at the close of the second day is

(A) 5/12
(B) 7/12
(C) 1/6
(D) ½
(E) 2½.

25. A snapshot measures 2½ inches by 1⅞ inches. It is to be enlarged so that the longer dimension will be 4 inches. The length of the enlarged shorter dimension will be

(A) 2½ inches
(B) 3 inches
(C) 3⅜ inches
(D) 3⅛ inches
(E) none of these.

26. From a piece of tin in the shape of a square 6 inches on a side, the largest possible circle is cut out. Of the

following, the ratio of the area of the circle to the area of the original square is closest in value to

(A) 4/5
(B) 2/3
(C) 3/5
(D) 1/2
(E) 3/4.

27. The approximate distance, s, in feet that an object falls in t seconds when dropped from a height is obtained by use of the formula $s=16\ t^2$. In 8 seconds the object will fall

(A) 15,384 feet
(B) 1,024 feet
(C) 256 feet
(D) 150 feet
(E) none of these.

28. A pound of water is evaporated from 6 pounds of sea water containing 4% salt. The percentage of salt in the remaining solution is

(A) $3\frac{1}{3}$
(B) 4
(C) 4 4/5
(D) 5
(E) none of these.

29. The speed of an object moving at 45 miles per hour is decreased by 22 feet per second. The reduced speed in miles per hour is

(A) 36
(B) 44
(C) 23
(D) 28
(E) 30.

30. The size of a parcel post package is limited to a maximum of a combined length plus girth (perimeter of cross-section) of 72 inches. The volume in cubic inches of the maximum package allowed having a length of 36 inches and a square cross-section is

(A) 1296
(B) 648
(C) 1958
(D) 2420
(E) 2916.

Correct Answers For The Foregoing Questions

(Check your answers with these that we provide. You should find considerable correspondence between them. If not, you'd better go back and find out why. On the next page we have provided concise clarifications of basic points behind the key answers. Please go over them carefully because they may be quite useful in helping you pick up extra points on the exam.)

Part I: Number Series

1. B	14. C
2. C	15. A
3. D	16. C
4. E	17. E
5. A	18. D
6. D	19. C
7. B	20. A
8. A	21. D
9. B	22. B
10. A	23. A
11. B	24. A
12. A	25. C
13. B	

Part II: Figure Analogies

1. 1	13. 1	25. 5
2. 4	14. 1	26. 5
3. 3	15. 2	27. 1
4. 2	16. 5	28. 2
5. 1	17. 3	29. 2
6. 1	18. 3	30. 4
7. 2	19. 3	31. 1
8. 2	20. 1	32. 4
9. 1	21. 1	33. 3
10. 1	22. 1	34. 3
11. 3	23. 2	35. 3
12. 2	24. 3	

Part III: Arithmetic Reasoning

1. A	16. C
2. C	17. B
3. B	18. C
4. C	19. A
5. C	20. C
6. B	21. D
7. E	22. B
8. A	23. B
9. A	24. C
10. B	25. B
11. A	26. A
12. B	27. B
13. D	28. C
14. A	29. E
15. A	30. E

SCORE 1

.....%

NO. CORRECT ÷

NO. OF QUESTIONS ON THIS TEST

SCORE 2

.....%

NO. CORRECT ÷

NO. OF QUESTIONS ON THIS TEST

SCORE 3

.....%

NO. CORRECT ÷

NO. OF QUESTIONS ON THIS TEST

NOW, CHECK YOUR METHODS
WITH OUR SIMPLIFIED PROBLEM SOLUTIONS,
WHICH FOLLOW DIRECTLY

Respondent's Exhibit No. 18

PART THREE: MATHEMATICAL REASONING

Directions: Instead of numbers, letters and symbols are, for the most part, used in the following problems. Perform the mathematical operation required in order to arrive at the correct answer.

Example: A man's salary was X dollars an hour for a 40-hour week and 2X dollars for each hour over 40 hours. What was his salary for the week if he worked 46 hours? (A) 42 X (B) 48X (C) 52X (D) 56X.

The correct answer is (C) 52X.

1. An automobile travels m miles in h hours. At this rate, how far will it travel in x hours?

(A) $\frac{m}{x}$

(B) $\frac{mx}{h}$

(C) $x = \frac{m}{h}$

(D) $\frac{mh}{x}$

2. If there is a total of J garbage trucks in operation in a city, covering a total street mileage of N miles at an average speed of E miles per hour, we can find the average street mileage per truck from the above data, without considering

(A) the total number of cars
(B) the total street mileage
(C) the average speed
(D) any of these values.

3. Clerk A sorts B letters per hour, clerk C sorts D letters per hour. The D letters which clerk C sorts exceed those which clerk A sorts by 10 letters per hour. Measured in number sorted per 8-hour day, clerk C exceeds A by

(A) $D - B \times 10$
(B) $(D - B) \times 8$
(C) $D + C - A + B$
(D) $C + D - A + B$.

4. The annual salary of a machinist is R dollars more than that of his assistant. His assistant earns V dollars annually. The amount in monthly salary, by which the machinist exceeds his assistant, is given by

(A) $\frac{R}{12}$

(B) $\frac{RV}{12}$

(C) $R - V$

(D) $12V - R$.

5. If $d = m - \frac{50}{m}$, and m is a positive number

which increases in value, d

(A) increases in value
(B) decreases in value
(C) remains unchanged
(D) fluctuates up and down in value.

6. If x is less than 10, and y is less than 5, it follows that
(A) x is greater than y
(B) $x - y = 5$
(C) $x = 2y$
(D) $x + y$ is less than 15.

7. A family of 5 has two employed members earning L dollars a month. The family receives a total semi-monthly

relief allowance of M dollars. If the rent allowance is N dollars, and the amount spent for food is twice that for rent, the amount spent monthly for all items other than food and rent is

(A) $L + 2M - 3N$

(B) $\dfrac{N + L + M}{5}$

(C) $L + M - 2N$

(D) $\dfrac{5}{N + L + M}$

8. If psychological studies of college students show K per cent to be emotionally unstable, the number of college students not emotionally unstable per one hundred college students is

(A) 100 minus K
(B) 100 times (K minus)
(C) K minus 1
(D) 1 minus K.

9. If the same quantity is added to both the numerator and the denominator of a proper fraction, the value of the new fraction is

(A) the same as the value of the original fraction
(B) one greater than the value of the original fraction
(C) less than the value of the original fraction
(D) greater than the value of the original fraction.

10. A is older than B. With the passage of time

(A) the ratio of the ages of A and B remains unchanged
(B) the ratio of the ages of A and B increases
(C) the ratio of the ages of A and B decreases
(D) the difference in their ages varies.

11. Your office wishes to purchase an adding machine. Company X offers you a standard model, less discounts of

10% and 5%. Company Y offers you the same model at the same list price, less discounts of 5% and 10%. Of the two plans, the total discount given by Company X, compared to that given by Company Y, is

(A) much larger
(B) slightly larger
(C) equal
(D) slightly less.

12. Suppose that the loss of water pressure in a hose due to friction is uniformly L pounds per square inch for every foot of hose. Of the following, the best estimate of the total loss in terms of pressure per square inch in a hose H feet long is

(A) H plus L pounds
(B) H times L pounds
(C) H divided by L pounds
(D) L divided by H pounds.

13. Suppose that R persons were rescued from burning buildings by firemen in a given year. Suppose also that P persons perished in burning buildings in that year. If R is less than S but greater than T and P is less than both M and N, it may safely be concluded that

(A) the sum of R and T is greater than S
(B) the sum of M and N is greater than P
(C) R is between M and N times as great as P
(D) R exceeds P to an indeterminate degree lying somewhere between S and N.

14. The sum of two even numbers and one odd number

(A) is always odd
(B) is always even
(C) may be odd or even
(D) is never divisible by another number.

15. If n represents a certain number, express in terms of n a number that is 4 more than 5 times n.

(A) $5n + 4$
(B) $4n + 5$
(C) 4n times 5
(D) 5n times 4.

16. Assume that the average time required for a department vehicle to reach the scene of an emergency is M minutes. Solely on the basis of this fact, the one of the following which is the most reasonable inference is that in

(A) no case did a vehicle reach the scene of an emergency in less than M minutes
(B) no case did a vehicle reach the scene of an emergency in more than M minutes
(C) every case a vehicle reached the scene of an emergency in exactly M minutes
(D) some cases vehicles reached the scene of an emergency after M minutes had elapsed.

17. In a certain year, fires occurred in K "Type Z" multiple dwellings. It is known that L per cent of the M multiple dwellings in New York City are of "Type Z". The fraction of "Type Z" multiple dwellings in which fires occurred during that year was

(A) K divided by L times M
(B) L times M divided by 100 K
(C) K divided by the quantity 100 times L times M
(D) 100 K divided by the quantity L times M.

18. When an arithmetical fraction is squared, the result in all cases is

(A) greater than the original fraction
(B) less than the original fraction
(C) equal to the original fraction
(D) none of these.

19. If x is greater than y, and x is greater than z, it follows that

(A) the average of y and z is less than x
(B) y is greater than z
(C) x is less than $y + z$
(D) $y = z$.

20. If A does a job in x days, and B does the same job in y days, what part of the job will they do in one day if they work together?

(A) the entire job

(B) $\frac{x}{2} + \frac{y}{2}$

(C) $\frac{x}{1} + \frac{y}{1}$

(D) $\frac{1}{x} + \frac{1}{y}$

21. A certain highway intersection has had A accidents over a ten-year period, resulting in B deaths. What is the yearly average death rate for the intersection?

(A) $A + B - 10$

(B) $\frac{B}{10}$

(C) $10 - \frac{A}{B}$

(D) $\frac{A}{10}$

22. A typist can address approximately R envelopes in a 7-hour day. A list containing S addresses is submitted with a request that all envelopes be typed within T hours. The number of typists needed to complete this task would be

(A) $\frac{7RS}{T}$

(B) $\frac{S}{7RT}$

(C) $\frac{R}{7ST}$

(D) $\frac{S}{\frac{R \times T}{7}}$

23. Employee X earns $L per year. Employee Y earns $R less per month. Both earn yearly increments of $T up to S years, the excess of Clerk X's earnings over Clerk Y's will be

(A) 12PR
(B) 12P(L minus R)
(C) 12PT(L plus R)
(D) P(T plus L minus R).

24. Suppose that the average number of violations per day during a period of P days is M. The total number of violations during the period of P days is expressed as

(A) M
(B) P
(C) the product of P and M
(D) the sum of M and P.

25. If an engine pumps G gallons of water per minute, then the number of gallons pumped in half an hour may be found by

(A) taking one-half of G
(B) dividing 60 by G
(C) multiplying G by 60 and then dividing the product by two
(D) dividing 30 by G.

Respondent's Exhibit No. 19

Test Items Similar to Those Used
in EPSAT Part III Physical Science Comprehension

1. The venturi measures pressure directly.
2. Water has its greatest density at a temperature of approximately 5°C.
3. Particulate matter is typically removed from the center of a centrifuge.
4. Carbon tetrachloride extinguishes fires by chemically combining with oxygen.
5. Transpiration cooling is commonly referred to as "sweat" cooling.
6. Dry ice is solidified carbon monoxide.
7. A thermostat can be constructed using a liquid which expands markedly when heated.
8. The hydraulic press uses a small force over a large surface to cause a large force over a small surface.
9. A typical piston pump can be used to draw water up from a depth of more than 60 feet.
10. When air is compressed it becomes cooler in the process.
11. A bell suspended outside one space satellite if rung could very easily be heard in a nearby space satellite.
12. Decreasing pressure will lower the boiling point of a liquid.
13. A clock without a compensated pendulum will run "fast" in cold weather.
14. Anode in an electron tube supplies an excess of electrons when heated.
15. To avoid picking up trapped water the inlet to a gasoline fuel pump is placed as closely as possible to the bottom of the gasoline tank.
16. It requires less energy to launch a satellite into orbit in an over the poles direction than around the equator direction.

17. Micro wave radio beams tend to follow the earth's curvature.
18. Ozone is an alternative atomic form of hydrogen.
19. Radio speakers work by alternately expanding and contracting the air around them.
20. In order to function an electrical transformer must have two windings.
21. The doppler effect can be used for measuring instruments.
22. Stroboscopes are used to measure rotational velocity.
23. Precision telescopes are likely to utilize front surface mirrors.
24. Properties of optical lenses are determined using the laws of diffraction.
25. Farsightedness in humans is corrected by using divergent eyeglass lenses.
26. The electron microscope has less resolving power than a light microscope.
27. Resonance is found in nearly all fields of physical science.
28. Ultrasonic frequencies are below the audible limit.
29. A suction cup holds to a surface due to the vacuum formed between cup and surface adhered to.
30. Transfer of heat by conduction occurs in all physical forms of matter.
31. Lightning arresters with blunt ends are more effective than sharp pointed ones.
32. Significant amounts of heat can be removed from a fluid whose temperature is 10°C.
33. In an electric toaster heat is transferred mainly by conduction.
34. Glass is a good conductor of electric current.
35. A milligram is equal to 100 grams.
36. Electrons moving in space are not influenced by magnetic fields through which they pass.
37. A ship weighs more when floating in fresh water than it does in salt water.

38. The rocket engine moves forward because of the thrust of the rapidly moving gasses exiting from its nozzle.
39. The magnetic axis of the earth coincides with its rotational axis.
40. When an electrical charge is passed through a gas three types of ions are produced.

Respondent's Exhibit No. 20 [1]

ETHICAL STANDARDS OF PSYCHOLOGISTS

The psychologist believes in the dignity and worth of the individual human being. He is committed to increasing man's understanding of himself and others. While pursuing this endeavor, he protects the welfare of any person who may seek his service or of any subject, human or animal, that may be the object of his study. He does not use his professional position or relationships, nor does he knowingly permit his own services to be used by others, for purposes inconsistent with these values. While demanding for himself freedom of inquiry and communication, he accepts the responsibility this freedom confers; for competence where he claims it, for objeciivity in the report of his findings, and for consideration of the best interests of his colleagues and of society.

SPECIFIC PRINCIPLES

Principle 1. Responsibility. The psychologist,[2] committed to increasing man's understanding of man, places high value on objectivity and integrity, and maintains the highest standards in the services he offers.

a. As a scientist, the psychologist believes that society will be best served when he investigates where his judgment indicates investigation is needed; he plans his research in such a way as to minimize the possibilitity that his findings will be misleading; and he publishes full reports of his work, never discarding

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[1] Copyrighted by the American Psychological Association, Inc., January 1963. Reprinted (and edited from the *American Psychologist*, January 1963, and as amended by the APA Council of Representatives in September 1965 and December 1972.

[2] A student of psychology who assumes the role of psychologist shall be considered a psychologist for the purpose of this code of ethics.

without explanation data which may modify the interpretation of results.

b. As a teacher, the psychologist recognizes his primary obligation to help others acquire knowledge and skill, and to maintain high standards of scholarship.

c. As a practitioner, the psychologist knows that he bears a heavy social responsibility because his work may touch intimately the lives of others.

Principle 2. Competence. The maintenance of high standards of professional competence is a responsibility shared by all psychologists, in the interest of the public and of the profession as a whole.

a. Psychologists discourage the practice of psychology by unqualified persons and assist the public in identifying psychologists competent to give dependable professional service. When a psychologist or a person identifying himself as a psychologist violates ethical standards, psychologists who know firsthand of such activities attempt to rectify the situation. When such a situation cannot be dealt with informally, it is called to the attention of the appropriate local, state, or national committee on professional ethics, standards, and practices.

b. Psychologists regarded as qualified for independent practice are those who (a) have been awarded a Diploma by the American Board of Professional Psychology, or (b) have been licensed or certified by state examining boards, or (c) have been certified by voluntary boards established by state psychological associations. Psychologists who do not yet meet the qualifications recognized for independent practice should gain experience under qualified supervision.

c. The psychologist recognizes the boundaries of his competence and the limitations of his techniques and does not offer services or use techniques that fail to meet professional standards in particular fields. The psychologist who engages in practice assists his client in obtaining professional help for all important aspects of his problem that fall outside the boundaries of his own competence. This principle requires, for example, that provision be made for the diagnosis and treatment of relevant medical problems and for referral to or consultation with other specialists.

d. The psychologist in clinical work recognizes that his effectiveness depends in good part upon his ability to maintain sound interpersonal relations, that temporary or more enduring aberrations in his own personality may interfere with this ability or distort his appraisals of others. There he refrains from undertaking any activity in which his personal problems are likely to result in inferior professional services or harm to a client; or if he is already engaged in such an activity when he becomes aware of his personal problems, he seeks competent professional assistance to determine whether he should continue or terminate his services to his client.

Principle 3. Moral and Legal Standards. The psychologist in the practice of his profession shows sensible regard for the social codes and moral expectations of the community in which he works, recognizing that violations of accepted moral and legal standards on his part may involve his clients, students, or colleagues in damaging personal conflicts, and impugn his own name and the reputation of his profession.

Principle 4. Misrepresentation. The psychologist avoids misrepresentation of his own professional qualifications,

affiliations, and purposes, and those of the institutions and organizations with which he is associated.

a. A psychologist does not claim either directly or by implication professional qualifications that differ from his actual qualifications, nor does he misrepresent his affiliation with any institution, organization, or individual, nor lead others to assume he has affiliations that he does not have. The psychologist is responsible for correcting others who misrepresent his professional qualifications or affiliations.

b. The psychologist does not misrepresent an institution or organization with which he is affiliated by ascribing to it characteristics that it does not have.

c. A psychologist does not use his affiliation with the American Psychological Association or its Divisions for purposes that are not consonant with the stated purposes of the Association.

d. A psychologist does not associate himself with or permit his name to be used in connection with any services or products in such a way as to misrepresent them, the degree of his responsibility for them, or the nature of his affiliation.

Principle 5. Public Statements. Modesty, scientific caution, and due regard for the limits of present knowledge characterize all statements of psychologists who supply information to the public, either directly or indirectly.

a. Psychologists who interpret the science of psychology or the services of psychologists to clients or to the general public have an obligation to report fairly and accurately. Exaggeration, sensationalism, superficiality, and other kinds of misrepresentations are avoided.

b. When information about psychological procedures and techniques is given, care is taken to indicate that

they should be used only by persons adequately trained in their use.

c. A psychologist who engages in radio or television activities does not participate in commercial announcements recommending purchase or use of a product.

Principle 6. Confidentiality. Safeguarding information about an individual that has been obtained by the psychologist in the course of his teaching, practice, or investigation is a primary obligation of the psychologist. Such information is not communicated to others unless certain important conditions are met.

a. Information received in confidence is revealed only after most careful deliberation and when there is clear and imminent danger to an individual or to society, and then only to appropriate professional workers or public authorities.

b. Information obtained in clinical or consulting relationships, or evaluative data concerning children, students, employees, and others are discussed only for professional purposes and only with persons clearly concerned with the case. Written and oral reports should present only data germane to the purposes of the evaluation, every effort should be made to avoid undue invasion of privacy.

c. Clinical and other materials are used in classroom teaching and writing only when the identity of the persons involved is adequately disguised.

d. The confidentiality of professional communications about individuals is maintained. Only when the originator and other persons involved give their express permission is a confidential professional communication shown to the individual concerned. The psychol-

ogist is responsible for informing the client of the limits of the confidentiality.

e. Only after explicit permission has been granted is the identity of research subjects published. When data have been published without permission for identification, the psychologist assumes responsibility for adequately disguising their sources.

f. The psychologist makes provisions for the maintenance of confidentiality in the preservation and ultimate disposition of confidential records.

Principle 7. Client Welfare. The psychologist respects the integrity and protects the welfare of the person or group with whom he is working.

a. The psychologist in industry, education, and other situations in which conflicts of interest may arise among various parties, as between management and labor, or between the client and employer of the psychologist, defines for himself the nature and direction of his loyalties and responsibilities and keeps all parties concerned informed of these commitments.

b. When there is a conflict among professional workers, the psychologist is concerned primarily with the welfare of any client involved and only secondarily with the interest of his own professional group.

c. The psychologist attempts to terminate a clinical or consulting relationship when it is reasonably clear to the psychologist that the client is not benefiting from it.

d. The psychologist who asks that an individual reveal personal information in the course of interviewing, testing, or evaluation, or who allows such information to be divulged to him, does so only after making certain that the responsible person is fully aware of

the purposes of the interview, testing, or evaluation and of the ways in which the information may be used.

e. In cases involving referral, the responsibility of the psychologist for the welfare of the client continues until this responsibility is assumed by the professional person to whom the client is referred or until the relationship with the psychologist making the referral has been terminated by mutual agreement. In situations where referral, consultation, or other changes in the conditions of the treatment are indicated and the client refuses referral, the psychologist carefully weighs the possible harm to the client, to himself, and to his profession that might ensue from continuing the relationship.

f. The psychologist who requires the taking of psychological tests for didactic, classification, or research purposes protects the examinees by insuring that the tests and test results are used in a professional manner.

g. When potentially disturbing subject matter is presented to students, it is discussed objectively, and efforts are made to handle constructively any difficulties that arise.

h. Care must be taken to insure an appropriate setting for clinical work to protect both client and psychologist from actual or imputed harm and the profession from censure.

i. In the use of accepted drugs for therapeutic purposes special care needs to be exercised by the psychologist to assure himself that the collaborating physician provides suitable safeguards for the client.

Principle 8. Client Relationship. The psychologist informs his prospective client of the important aspects of the potential relationship that might affect the client's decision to enter the relationship.

a. Aspects of the relationship likely to affect the client's decision include recording of an interview, the use of interview material for training purposes, and observation of an interview by other persons.

b. When the client is not competent to evaluate the situation (as in the case of a child), the person responsible for the client is informed of the circumstances which may influence the relationship.

c. The psychologist does not normally enter into a professional relationship with members of his own family, intimate friends, close associates, or others whose welfare might be jeopardized by such a dual relationship.

Principle 9. Impersonal Services. Psychological services for the purpose of diagnosis, treatment, or personalized advice are provided only in the context of a professional relationship, and are not given by means of public lectures or demonstrations, newspaper or magazine articles, radio or television programs, mail, or similar media.

a. The preparation of personnel reports and recommendations based on test data secured solely by mail is unethical unless such appraisals are an integral part of a continuing client relationship with a company, as a result of which the consulting psychologist has intimate knowledge of the client's personnel situation and can be assured thereby that his written appraisals will be adequate to the purpose and will be properly interpreted by the client. These reports must not be embellished with such detailed analyses of the subject's personality traits as would be appropriate only after intensive interviews with the subject. The reports must not make specific recommendations as to employment or placement of the subject which go beyond the psychologist's knowledge of the job requirements of the company. The reports must not purport to eliminate the company's need to carry on such other regular employment or personnnel practices as appraisal of the work history, checking of references, past performance in the company.

Principle 10. Announcement of Services. A psychologist adheres to professional rather than commerical standards in making known his availability for professional services.

a. A psychologist does not directly solicit clients for individual diagnosis or therapy.

b. Individual listings in telephone directories are limited to name, highest relevant degree, certification status, address, and telephone number. They may also include identification in a few words of the psychologist's major areas of practice: for example, child therapy, personnel selection, industrial psychology. Agency listings are equally modest.

c. Announcements of individual private practice are limited to a simple statement of the name, highest relevant degree, certification or diplomate status, address, telephone number, office hours, and a brief explanation of the types of services rendered. Announcements of agencies may list names of staff members with their qualifications. They conform in other particulars with the same standards as individual announcements, making certain that the true nature of the organization is apparent.

d. A psychologist or agency announcing nonclinical professional services may use brochures that are descriptive of services rendered but not evaluative. They may be sent to professional persons, schools, business

firms, government agencies, and other similar organizations.

e. The use in a brochure of "testimonials from satisfied users" is unacceptable. The offer of a free trial of services is unacceptable if it operates to misrepresent in any way the nature or the efficacy of the services rendered by the psychologist. Claims that a psychologist has unique skills or unique devices not available to others in the profession are made only if the special efficacy of these unique skills or devices has been demonstrated by scientifically acceptable evidence.

f. The psychologist must not encourage (nor, within his power, even allow) a client to have exaggerated ideas as to the efficacy of services rendered. Claims made to clients about the efficacy of his services must not go beyond those which the psychologist would be willing to subject to professional scrutiny through publishing his results and his claims in a professional journal.

Principle 11. Interprofessional Relations. A psychologist acts with integrity in regard to colleagues in psychology and in other professions.

a. Each member of the Association cooperates with the duly constituted Committee on Scientific and Professional Ethics and Conduct in the performance of its duties by responding to inquiries with reasonable promptness and completeness. A member taking longer than 30 days to respond to such inquiries shall have the burden of demonstrating that he acted with "reasonable promptness."

b. A psychologist does not normally offer professional services to a person receiving psychological assistance from another professional worker except by agreement with the other worker or after the termination of the client's relationship with the other professional worker.

c. The welfare of clients and colleagues requires that psychologists in joint practice or corporate activities make an orderly and explicit arrangement regarding the conditions of their association and its possible termination. Psychologists who serve as employers of other psychologists have an obligation to make similar appropriate arrangements.

Principle 12. Remuneration. Financial arrangements in professional practice are in accord with professional standards that safeguard the best interest of the client and the profession.

a. In establishing rates for professional services, the psychologist considers carefully both the ability of the client to meet the financial burden and the charges made by other professional persons engaged in comparable work. He is willing to contribute a portion of his services to work for which he receives little or no financial return.

b. No commission or rebate or any other form of remuneration is given or received for referral of clients for professional services.

c. The psychologist in clinical or counseling practice does not use his relationships with clients ot promote, for personal gain or the profit of an agency, commercial enterprises of any kind.

d. A psychologist does not accept a private fee or any other form of remuneration for professional work with a person who is entitled to his services through an institution or agency. The policies of a particular agency may make explicit provision for private work with its clients by members of its staff, and in such instances the client must be fully apprised of all policies affecting him.

Principle 13. Test Security. Psychological tests and other assessment devices, the value of which depends in part on the naivete of the subject, are not reproduced or described in popular publications in ways that might invalidate the techniques. Access to such devices is limited to persons with professional interests who will safeguard their use.

a. Sample items made up to resemble those of tests being discussed may be reproduced in popular articles and elsewhere, but scorable tests and actual test items are not reproduced except in professional publications.

b. The psychologist is responsible for the control of psychological tests and other devices and procedures used for instruction when their value might be damaged by revealing to the general public their specific contents or underlying principles.

Principle 14. Test Interpretation. Test scores, like test materials, are released only to persons who are qualified to interpret and use them properly.

a. Materials for reporting test scores to parents, or which are designed for self-appraisal purposes in schools, social agencies, or industry are closely supervised by qualified psychologists or counselors with provisions for referring and counseling individuals when needed.

b. Test results or other assessment data used for evaluation or classification are communicated to employers, relatives, or other appropriate persons in such a manner as to guard against misinterpretation or misuse. In the usual case, an interpretation of the test result rather than the score is communicated.

c. When test results are communicated directly to parents and students, they are accompanied by adequate interpretive aids or advice.

Principle 15. Test Publication. Psychological tests are offered for commercial publication only to publishers who present their tests in a professional way and distribute them only to qualified users.

a. A test manual, technical handbook, or other suitable report on the test is provided which describes the method of constructing and standardizing the test, and summarizes the validation research.

b. The populations for which the test has been developed and the purposes for which it is recommended are stated in the manual. Limitations upon the test's dependability, and aspects of its validity on which research is lacking or incomplete, are clearly stated. In particular, the manual contains a warning regarding interpretations likely to be made which have not yet been substantiated by research.

c. The catalog and manual indicate the training or professional qualifications required for sound interpretation of the test.

The test manual and supporting documents take into account the principles enunciated in the *Standards for Educational and Psychological Tests and Manuals.*

e. Test advertisements are factual and descriptive rather than emotional and persuasive.

Principle 16. Research Precautions. The psychologist assumes obligations for the welfare of his research subjects, both animal and human.

The decision to undertake research should rest upon a considered judgment by the individual psychologist about how best to contribute to psychological science and to human welfare. The responsible psychologist weighs alternative directions in which personal energies and resources might be invested. Having made the decision to conduct re-

search, psychologists must carry out their investigations with respect for the people who participate and with concern for their dignity and welfare. The Principles that follow make explicit the investigator's ethical responsibilities toward participants over the course of research, from the initial decision to pursue a study to the steps necessary to protect the confidentiality of research data. These Principles should be interpreted in terms of the contexts provided in the complete document [3] offered as a supplement to these Principles.

a. In planning a study the investigator has the personal responsibility to make a careful evaluation of its ethical acceptability, taking into account these Principles for research with human beings. To the extent that this appraisal, weighing scientific and humane values, suggests a deviation from any Principle, the investigator incurs an increasingly serious obligation to seek ethical advice and to observe more stringent safeguards to protect the rights of the human research participants.

b. Responsibility for the establishment and maintenance of acceptable ethical practice in research always remains with the individual investigator. The investigator is also responsible for the ethical treatment of research participants by collaborators, assistants, students, and employees, all of whom, however, incur parallel obligations.

c. Ethical practice requires the investigator to inform the participant of all features of the research that reasonably might be expected to influence willingness to participate, and to explain all other aspects of the

[3] *Ethical Principles in the Conduct of Research with Human Participants*, available upon request from the American Psychological Association.

research about which the participant inquires. Failure to make full disclosure gives added emphasis to the investigator's abiding responsibility to protect the welfare and dignity of the research participant.

d. Openness and honesty are essential characteristics of the relationship between investigator and research participant. When the methodological requirements of a study necessitate concealment or deception, the investigator is required to ensure the participant's understanding of the reasons for this action and to restore the quality of the relationship with the investigator.

e. Ethical practice requires the investigator to inform the participant of all features of the research that reasonably might be expected to influence willingness to participate, and to explain all other aspects of the research about which the participant inquires. Failure to make full disclosure gives added emphasis to the investigator's abiding responsibility to protect the participant's dignity and welfare.

f. Ethically acceptable research begins with the establishment of a clear and fair agreement between the investigator and the research participant that clarifies the responsibilities of each. The investigator has the obligations to honor all promises and commitments included in that agreement.

g. The ethical investigator protects participants from physical and mental discomfort, harm and danger. If the risk of such consequences exists, the investigator is required to inform the participant of that fact, secure consent before proceeding, and take all possible measures to minimize distress. A research procedure may not be used if it is likely to cause serious and lasting harm to participants.

h. After the data are collected, ethical practice requires the investigator to provide the participant with a full clarification of the nature of the study and to remove any misconceptions that may have arisen. Where scientific or humane values justify delaying or withholding information, the investigator acquires a special responsibility to assure that there are no damaging consequences for the participant.

i. Where research procedures may result in undesirable consequences for the participant, the investigator has the responsibility to detect and remove or correct these consequences, including, where relevant, long-term after effects.

j. Information obtained about the research participants during the course of any investigation is confidential. When the possibility exists that others may obtain access to such information, ethical research practice requires that this possibility, together with the plans for protecting confidentiality, be explained to the participants as a part of the procedure for obtaining informed consent.

k. A psychologist using animals in research adheres to the provisions of the Rules Regarding Animals, drawn up by the Committee on Precautions and Standards in Animal Experimentation and adopted by the American Psychological Association.

l. Investigations of human subjects using experimental drugs (for exempt hallucinogenic, psychotomimetic, psychedelic or similar substances) should be conducted only in such settings as clinics, hospitals, or research facilities maintaining appropriate safeguards for the subjects.

Principle 17. Publication Credit. Credit is assigned to those who have contributed to a publication, in proportion to their contribution, and only to these.

a. Major contributions of a professional character, made by several persons to a common project, are recognized by joint authorship. The experimenter or author who has made the principal contribution to a publication is identified as the first listed.

b. Minor contributions of a professional character, extensive clerical or similar nonprofessional assistance, and other minor contributions are acknowledged in footnotes or in an introductory statement.

c. Acknowledgement through specific citations is made for unpublished as well as published material that has directly influenced the research or writing.

d. A psychologist who compiles and edits for publication the contributions of others publishes the symposium or report under the title of the committee or symposium, with his own name appearing as chairman or editor among those of the other contributors or committee members.

Principle 18. Responsibility toward Organization. A psychologist respects the rights and reputation of the institute or organization with which he is associated.

a. Materials prepared by a psychologist as a part of his regular work under specific direction of his organization are the property of that organization. Such materials are released for use or publication by a psychologist in accordance with policies of authorization, assignment of credit, and related matters which have been established by his organization.

b. Other material resulting incidentally from activity supported by any agency, and for which the psychologist rightly assumes individual responsibility, is published with disclaimer for any responsibility on the part of the supporting agency.

Principle 19. Promotional Activities. The psychologist associated with the development or promotion of psychological devices, books, or other products offered for commercial sale is responsible for ensuring that such devices, books, or products are presented in a professional and factual way.

a. Claims regarding performance, benefits, or results are supported by scientifically acceptable evidence.

b. The psychologist does not use professional journals for the commercial exploitation of psychological products, and the psychologist-editor guards against such misuse.

c. The psychologist with a financial interest in the sale or use of a psychological product is sensitive to possible conflict of interest in his promotion of such products and avoids compromise of his professional responsibilities and objectives.

Respondent's Exhibit No. 21

INTRODUCTION TO TESTING

The tests that you will be taking today will last approximately ——. Can everyone stay that long? *Pause.* Are there any parking problems for being here that length of time? *Pause.* Have you ever been tested for a job with this Company before? *Pause.*

Before we begin I would like to tell you a few things about the tests that you will be taking:

Length of test battery

Composition of battery (clerical, mechanical, etc.)

Timing of tests (some or all tests timed; can or can't tell the time limit on tests).

The tests you will be taking today will be just one factor in your evaluation. Other things such as oth · jobs that you have had in the past, courses that you've had in school —these things will also be taken into consideration. Your test scores will be compared to the test scores of employes who are working successfully on the job.

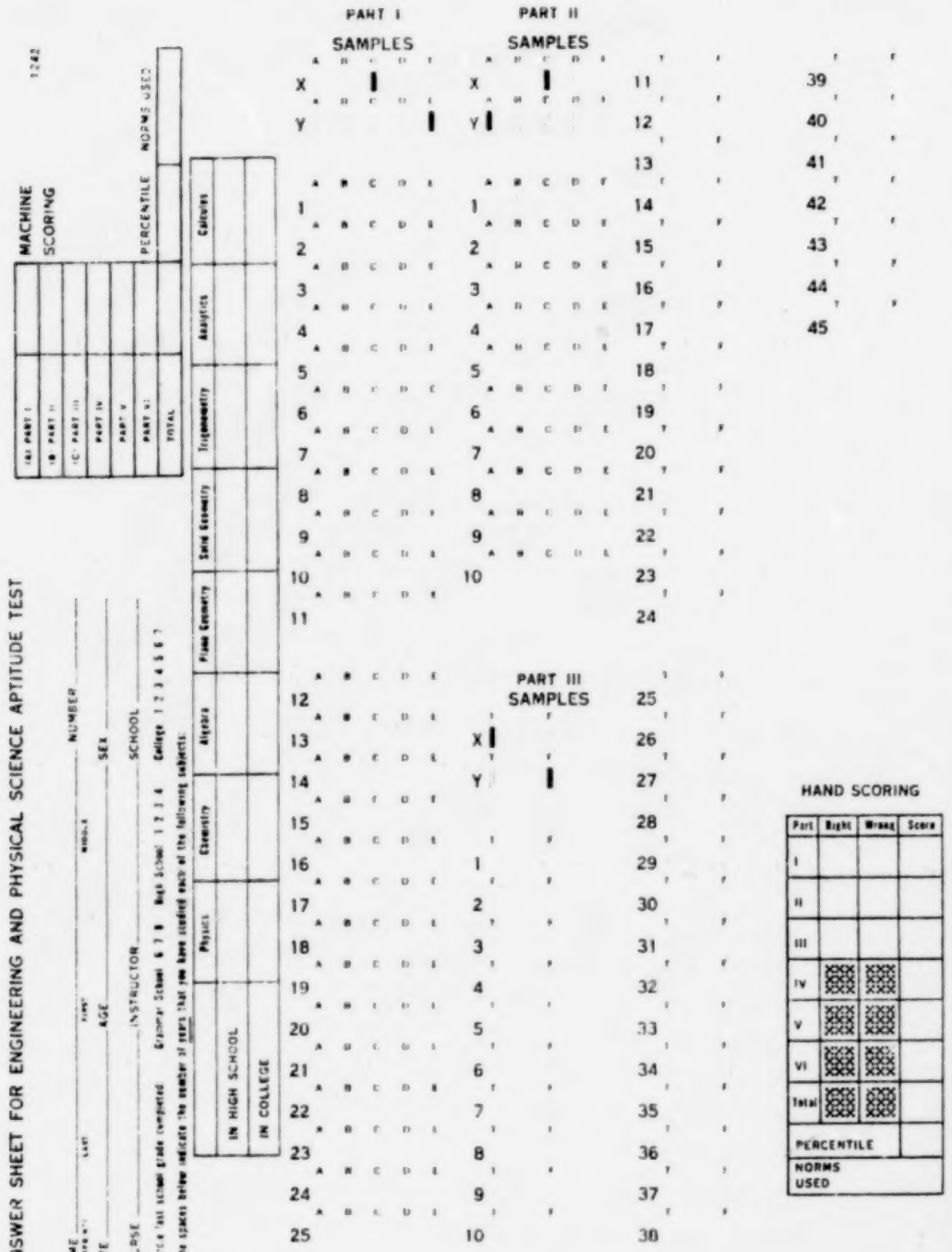
Your test scores are confidential. We will tell the Employment Department generally how you did on these tests and they may talk to Company departments about your being put on a certain job, but your test scores are kept only in our files.

Your test scores may be used again if they can help us review your qualifications for other jobs. These same scores may be used if you apply here for work again or you may be asked to take the same or similar tests. If you are employed by the Company these test results as well as others may be used in your consideration for other jobs within the Company.

Make yourself comfortable. There are ashtrays on the tables. You may smoke anytime you want to.

Are there any questions?

Respondent's Exhibit No. 22



ANSWER SHEET FOR ENGINEERING AND PHYSICAL SCIENCE APTITUDE TEST

NAME _____ NUMBER _____
(LAST) (FIRST) (MIDDLE)

DATE _____ AGE _____ SEX _____

COURSE _____ INSTRUCTOR _____ SCHOOL _____

Encircle your school grade completed: Grammar School 6 7 8 High School 1 2 3 4 College 1 2 3 4 5 6 7

In the spaces below indicate the number of years that you have studied each of the following subjects:

	Physics	Chemistry	Algebra	Plane Geometry	Solid Geometry	Trigonometry	Analytics	Calculus
IN HIGH SCHOOL								
IN COLLEGE								

MACHINE SCORING

(A) PART I	(B) PART II	(C) PART III	PART IV	PART V	PART VI	TOTAL
					PERCENTILE	
					NORMS USED	

PART I SAMPLES

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Y A B C D E

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22 A B C D E
23 A B C D E
24 A B C D E
25 A B C D E

PART II SAMPLES

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10 A B C D E

PART III SAMPLES

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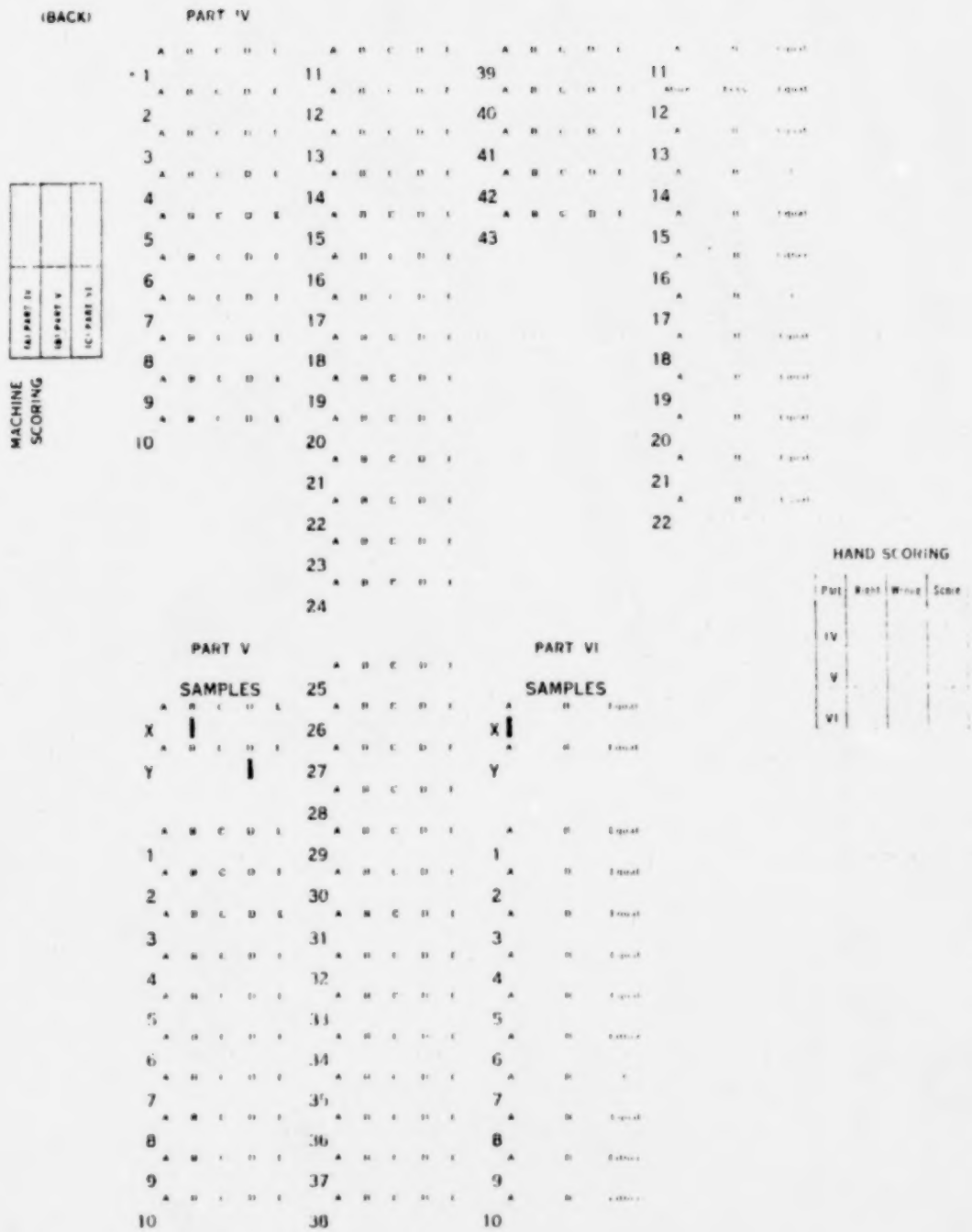
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40 A B C D E
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42 A B C D E
43 A B C D E
44 A B C D E
45 A B C D E

HAND SCORING

Part	Right	Wrong	Score
I			
II			
III			
IV	XXX	XXX	
V	XXX	XXX	
VI	XXX	XXX	
Total	XXX	XXX	
PERCENTILE			
NORMS USED			



(BACK)

MACHINE SCORING

(A) PART IV	(B) PART V	(C) PART VI

PART IV

1 A B C D E
2 A B C D E
3 A B C D E
4 A B C D E
5 A B C D E
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9 A B C D E
10 A B C D E
11 A B C D E
12 A B C D E
13 A B C D E
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33 A B C D E
34 A B C D E
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37 A B C D E
38 A B C D E
39 A B C D E
40 A B C D E
41 A B C D E
42 A B C D E
43 A B C D E

PART V SAMPLES

X A B C D E

Y A B C D E

1 A B C D E
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5 A B C D E
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8 A B C D E
9 A B C D E
10 A B C D E

PART VI SAMPLES

X A B C D E

Y A B C D E

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3 A B C D E
4 A B C D E
5 A B C D E
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7 A B C D E
8 A B C D E
9 A B C D E
10 A B C D E

HAND SCORING

Part	Right	Wrong	Score
IV			
V			
VI			

SCORE | PERCENTILE

NOT TO BE USED

REVISED MINNESOTA PAPER FORM BOARD TEST

PREPARED BY R. LIKERT AND WM. H. QUASHA

NAME _____ (LAST) _____ (FIRST)

DATE _____ AGE _____ (YEARS) _____ (MONTHS) SEX _____ (MALE OR FEMALE)

PLACE _____ (SCHOOL OR COMPANY) _____ CITY _____ STATE _____

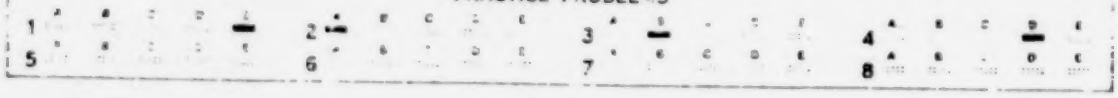
HIGHEST SCHOOL GRADE COMPLETED _____

SERIES USED

MA MB

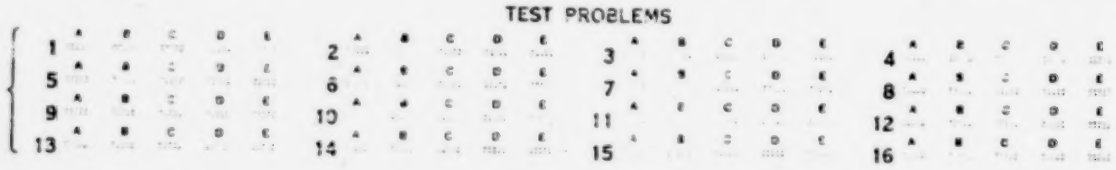
(CIRCLE ONE)

PRACTICE PROBLEMS



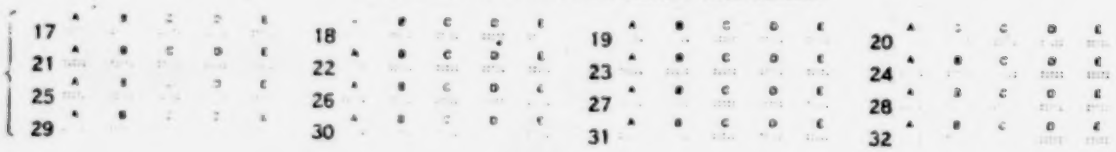
TEST PROBLEMS

PAGE 2

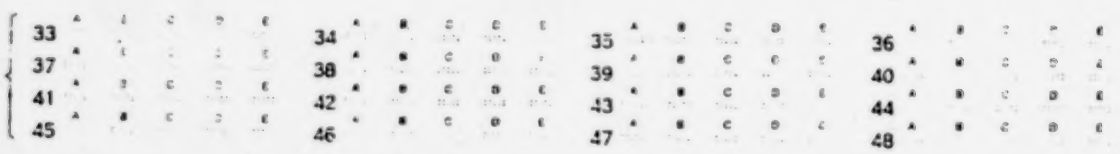


BE SURE YOUR MARKS ARE HEAVY AND BLACK.

PAGE 3

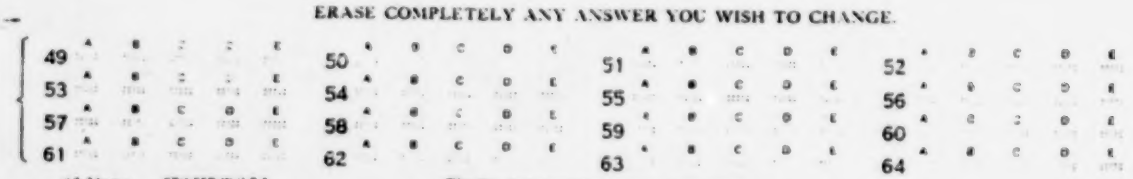


PAGE 4



ERASE COMPLETELY ANY ANSWER YOU WISH TO CHANGE.

PAGE 5



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The Psychological Corporation, New York

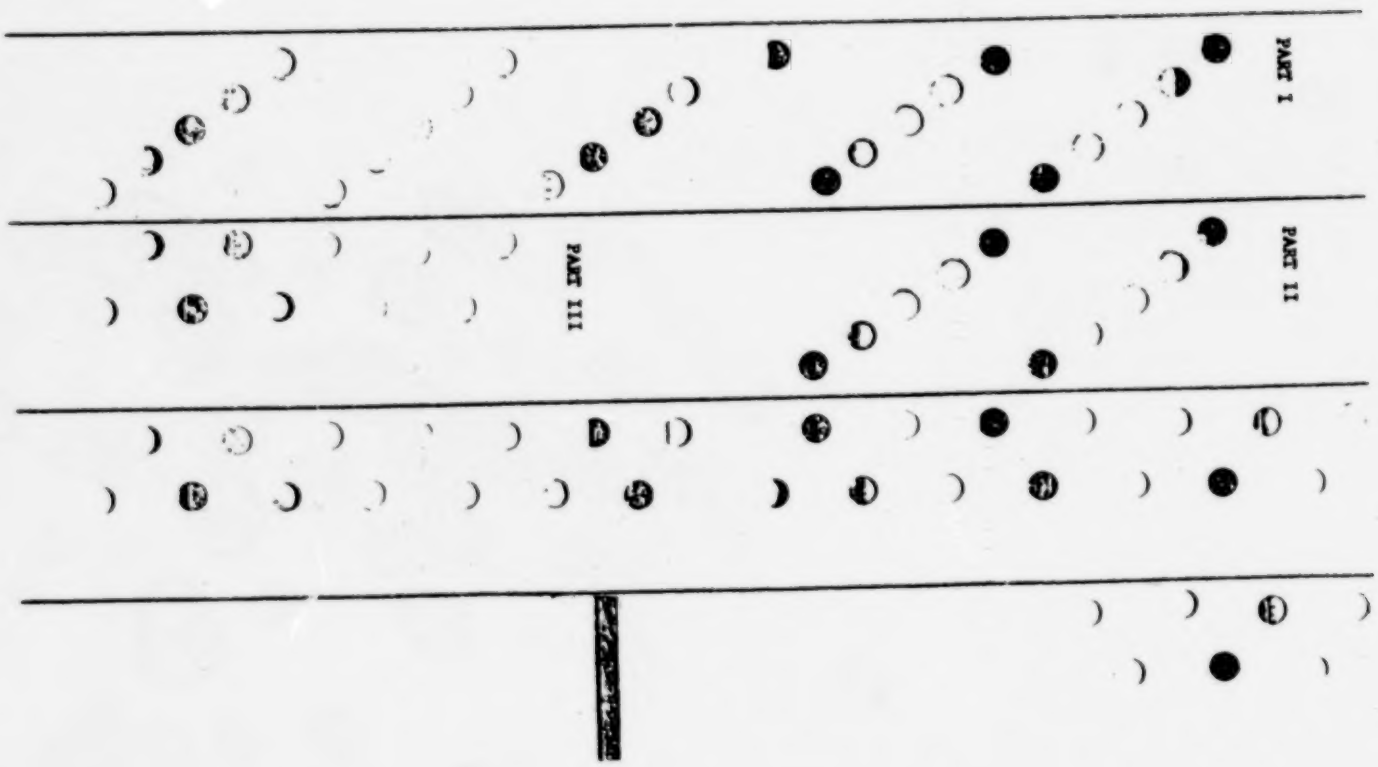
IBM FORM [illegible]

Respondent's Exhibit No. 23

448

ENGINEERING AND PHYSICAL SCIENCE APTITUDE TEST

SIDE 1



Respondent's Exhibit No. 24

449

Order of the Supreme Court Granting the Petition for Writ

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 27, 1978

John A. McGuinn, Esq.
Farmer, Shibley, McGuinn & Flood
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

RE: Detroit Edison Company v. National Labor Relations Board, No. 77-968

Dear Mr. McGuinn:

The Court today took the following action in the above case:

"The petition for a writ of certiorari is granted."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a), is due and payable.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By /s/ June M. Hoffmann
(Miss) June M. Hoffmann
Assistant Clerk

Enclosure

No. 77-968

Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

DETROIT EDISON COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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Section 8(a)(1), 29 U.S.C. 158(a)(1) 3

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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DETROIT EDISON COMPANY, PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-12a) is reported at 560 F. 2d 722. The decision and order of the National Labor Relations Board (Pet. 14a-59a) are reported at 218 NLRB 1024.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1977, and petitions for rehearing and rehearing *en banc* were denied on November 22, 1977 (Pet. 2; Pet App. 13a). The petition for a writ of certiorari was filed on January 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board exceeded its remedial authority by ordering the Company to furnish to the Union, directly rather than indirectly through a Union hired psychologist, copies of tests and test results relevant to the processing of employee grievances.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) is set forth at Pet. 3.

STATEMENT

Since April 1971, petitioner has been party to collective bargaining agreements with the certified representative of its Monroe power plant employees, Local 223 of the Utility Workers Union of America, AFL-CIO (herein "the Union") (Pet. App. 19a-20a). In late 1971, petitioner began the process of filling six bargaining unit positions (known as "instrument man jobs"). The collective agreement required that notice of such vacancies be posted and that first consideration be given to present unit employees. Among the qualifications for the vacant positions was the achievement of a minimum score on a number of tests selected by petitioner (Pet. App. 20a).[1] Ten unit employees bid for the instrument man slots and took petitioner's tests. All were rejected for failure to achieve the minimum score set by petitioner (Pet. App. 20a). In January 1972, the Union filed a grievance protesting the rejections of the unit applicants, asserting

[1]The tests were selected by petitioner's Industrial Psychology Division on the basis of two studies which indicated a positive correlation between test scores and the performance of incumbent instrument men (Pet. App. 22a-24a).

that the tests were unfair and that petitioner's established minimum score (10.3) was not a "reasonable qualification," as required by the collective agreement (Pet. App. 21a).[2] In order to process the grievance, the Union requested that petitioner supply it with copies of the tests, the applicants' test papers, and their scores. Petitioner refused. (Pet. App. 30a-31a.)

The grievance was rejected by petitioner at all levels, and reached arbitration. The Union asked the arbitrator to order production of the requested materials, but the arbitrator declined on the ground that he did not believe he had the authority to do so (Pet. App. 31a-32a, 34a). The Union and petitioner agreed to proceed with the arbitration without the materials, subject to the right of the Union to reopen the case of petitioner were subsequently ordered by a court to provide them (Pet. App. 67a-68a). The arbitrator issued his decision in December 1973, upholding the use of the tests, but finding that petitioner had set the cutoff score too high (Pet. App. 38a-39a). As a result of the arbitration decision, three of the applicants were reconsidered, but only one was promoted to an instrument man job (Pet. App. 39a).

Upon a charge filed by the Union, a complaint was issued against petitioner, alleging that it had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to provide the requested information (Pet. App. 18a-19a). Following a hearing, the Board's Administrative Law Judge

[2]The agreement included a provision that, "whenever reasonable qualifications and abilities of [applicants being considered for a job] are not significantly different," unit seniority would govern the selection (Pet. App. 26a-27a).

sustained the allegations of the complaint (Pet. App. 54a), and recommended that petitioner be ordered (Pet. App. 55a-56a)

> to supply copies of the battery of tests administered to the employee applicants for the position of Instrument Man B in this proceeding, including the actual test papers of the applicants (necessary to check the accuracy of the scoring of the tests), only to a qualified psychologist selected by the Union to act in its behalf * * *. The psychologist shall be free to fully advise the Union concerning these tests, so that the Union may fully protect the rights of the employees in the appropriate unit; the Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests. After the conclusion of the arbitration proceeding, * * * all copies of the battery of tests shall be returned to [the Company].[3]

---

[3]The Administrative Judge stated that he was recommending that the materials be supplied not directly to the Union, but to a psychologist hired by it, because

> mere disclosure of the tests to lay Union representatives is not likely to be productive of constructive results. If the tests are to be properly analyzed, this should be done by those who have the expertise to deal with the concept involved. * * * [I]n some cases, as this, the technology of the efficiency experts may outrun the ability of the individual to cope. The individual then needs an expert of his own. However, this does not affect the right of the employee, through his representative, to be informed, but may determine the manner or form [in] which the information is submitted. [Pet. App. 54a.]

The Administrative Judge also recommended that the actual scores of each applicant on the test battery be provided directly to the Union (Pet. App. 56a).

Petitioner excepted to the latter recommendation, but not to the former. It specifically requested the Board "to adopt that part of the order which requires that tests be turned over to a qualified psychologist selected by the Union," including the provision that such submission be done in accord with the limitations spelled out by the Judge (A. 43-44).[4]

The Board adopted the Judge's findings and recommendations, except that it "would not condition the Union's access to the information on the retention of a psychologist but rather would have [the Company] submit the information directly to the Union and let the Union decide whether the assistance or expertise of a psychologist is required" (Pet. App. 15a).[5] The Board recognized the interest in maintaining security of the tests and therefore, "in order to preserve their future utility, impose[d] the same restrictions upon their use by the Union as recommended by the Administrative Law Judge" (Pet. App. 16a).

A divided court of appeals[6] enforced the Board's order, noting that petitioner "did not except to the [Administrative Law Judge's] finding that it had engaged in an

---

[4]"A." refers to the Appendix in the court of appeals.

[5]Member Kennedy would have adopted the Administrative Judge's recommended order (Pet. App. 17a).

[6]Judge Weick, dissenting (Pet. App. 8a-12a) suggested that turning over the test papers to the Union was unnecessary, and would destroy the future value of the tests, would breach the confidential privilege of the applicants, and would subject the examiner to disciplinary action. We address these objections below.

unfair labor practice by refusing the union's request for the test materials" (Pet. App. 2a), and did not contest "the finding that the tests, answer sheets and scores are relevant" (Pet. App. 5a). The court rejected petitioner's contention that the Board erred in ordering that the battery of tests be provided directly to the Union, concluding that the "answer to [petitioner's] concern about the possibility of the tests falling into unauthorized hands is found in the Board's adoption of the administrative law judge's limitations on use of the materials by the union. The restrictions on use of the materials and obligation to return them to [the Company] are part of the decision and order which we enforce. Violation of these provisions would be subject to the same sanctions as violation of any provision of a judicially enforced order of the Board." (Pet. App. 6a-7a.)

The court also rejected petitioner's contention that it would be a breach of confidentiality to give the Union test scores linked to the names of employees taking the test because the "requirement that the bargaining representative be furnished with relevant information necessary to carry out its duties overcomes any claim of confidentiality in the absence of a showing of great likelihood of harm flowing from the disclosure" (Pet. App. 7a). Finally, the court rejected petitioner's contention that direct disclosure of the test battery and the linked test scores "would involve [the Company's] industrial psychologists in a breach of their professional ethical code." The "professional code of the American Psychological Association can[not] stand as a barrier to the right of a duly chosen and certified collective bargaining representative to receive information of use to it in carrying out its duties and responsibilities. The Board showed its consideration for the expressed concerns of the company and the [American] Psychological Association by adopting the limitations on use of the material recommended by the administrative law judge." (Pet. App. 8a.)

ARGUMENT

Petitioner recognizes that *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, holds that it is a violation of the duty to bargain imposed by Section 8(a)(5) of the Act for an employer to deny the bargaining representative relevant information for use under a contractually-established grievance procedure (Pet. 14). And it does not appear to challenge the Administrative Law Judge's finding, adopted by the Board, that the test materials requested by the Union were "relevant and reasonably necessary to the processing of employee grievances" (Pet. App. 55a), within the purview of *Acme*.[7] Indeed, following the decision of the Administrative Judge, petitioner stated that it had no objection to turning over the materials, subject to the restrictions imposed by

---

[7]Petitioner's question presented (Pet. 2) states that "the employer gave or offered to give the Union sufficient information to determine the validity of the tests, and the arbitrator * * * found that production of the actual test battery was irrelevant to the arbitration proceeding and award." Petitioner does not argue this point in the body of the petition. In any event, the Administrative Judge found that, while the statistics offered by petitioner may "tend to show that the tests are valid to serve *the employer's purpose:* i.e., they may serve to identify those employees likely to do well on the job," they

> do not serve to inform the employees, or their representative, whether the tests are truly job related or contain objectionable distortions (it is admitted that "valid" and "job related" are not coextensive), whether they have built-in bias and are, in fact, discriminatory, or whether, in sum, they tend to undercut [the Company's] contract commitment to promote by seniority where there is no "significant difference" between the "reasonable qualifications and abilities" of the applicants for promotion. [Pet. App. 47a; emphasis in original.]

Moreover, while the arbitrator ruled that he had no authority to compel production of the material sought by the Union, he reserved the right of the Union to reopen the arbitration case if it obtained the materials through court order (*supra*, p. 3).

the Judge, to a Union hired psychologist who could show them to the Union (Pet. 6; Pet. App. 55a-56a). Accordingly, the only issue presented on this record is whether the Board exceeded its remedial authority by ordering petitioner to furnish the relevant test materials to the Union, directly, rather than indirectly through a Union hired psychologist. In our submission, the Board's order is a reasonable exercise of its remedial authority; there is no conflict among the circuits;[8] and, accordingly, the case does not warrant review by this Court.

1. Petitioner's contention that the Board's order poses "insuperable barriers to the continuation of * * * extensive testing programs" (Pet. 10) rests on the assumption that "a requirement to turn over the test battery to unions representing employees will naturally lead to foreknowledge of the actual test items by all or a part of the employees who are to take the tests in the future" (*ibid.*). In other words, petitioner does not challenge the adequacy of the restrictions imposed by the Board on the Union's use of the test materials,[9] but

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[8]The Second Circuit's decision in *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420, is clearly distinguishable. In *Kirkland*, the court reversed a district court ruling ordering that a new examination replacing the old, discriminatory test be submitted to the plaintiffs for review, where the plaintiffs themselves would subsequently be taking the new test; the case was remanded to the district judge with instructions to take "steps * * * to insure confidentiality." *Id.* at 427. In the instant case, on the other hand, the order did not require the tests to be submitted to potential test-takers, and indeed made provisions to insure that such people did not have access to the tests.

[9]As noted *supra*, p. 4, the Board's order includes the requirement that the Union "not * * * copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of

assumes that the Union will violate the terms of the order. However, as this Court has stated, "[w]e cannot assume that a union conducts its operations in violation of law." *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, 67[illegible]0 Cf. *Whalen* v. *Roe*, 429 U.S. 589, 601-602; *DuPont* v. *Finklea*, S.D. W.Va., Civ. Action No. 77-2059-CH, decided December 20, 1977.

Moreover, the court of appeals provided that:

> The restrictions on use of the materials and obligation to return them to Detroit Edison are part of the decision and order which we enforce. Violation of these provisions would be subject to the same sanctions as violation of any provision of a judicially enforced order of the Board. [Pet. App. 7a.]

Thus, violation of the restrictions would subject the Union to contempt proceedings,[11] just as would any other flouting of a court order.

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the contents of the tests. After the conclusion of the arbitration proceeding * * * all copies of the battery of tests shall be returned to [the Company]."

The Administrative Judge, whose order petitioner asked the Board to adopt, based his recommendation that the test battery be turned over to a Union hired psychologist, not on "security" grounds, but on his view that the Union would need professional assistance (see note 3, *supra*). The Board decided to leave to the Union the decision whether it needed a psychologist to aid it in analyzing and interpreting the test materials (Pet. App. 15a). Since the services of a professional psychologist are costly, the Board was reasonable in not requiring the Union to incur this expense unless it believed it was necessary for the intelligent processing of the grievance.

[10]Just as the Company's industrial psychologists have reasons rooted in professional integrity not to improperly disclose or use the tests, so has the Union. The Union's future ability to obtain such data to pursue its representation function would obviously be jeopardized by improper disclosure.

[11]The Union was a party to the Board proceeding (Pet. App. 14a, 18a). By accepting the materials from petitioner under the provisions of the order limiting use of the materials, the Union would be

2. Similarly, there is no merit in the contention of petitioner and *amici curiae* Chamber of Commerce of the United States ("Chamber") and American Psychological Association ("APA") that the Board order enforced by the court below jeopardizes the use of aptitude tests under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. 2000e, *et seq.* (Pet. 10-13; APA Br. 15-16; Chamber Br. 7-11). This contention is premised on the assumption, shown to be unfounded (*supra*, pp. 8-9), that the Union will necessarily disclose the materials to potential test-takers, in violation of the limitations on use embodied in the Board's order and the decree of the court below.

Moreover, contrary to petitioner's and APA's contention, the Board's order does not contravene the APA "Standards for Educational and Psychological Tests." Standard 15 (Pet. [illegible]) states that there is a "responsibility for maintaining test security." As we have said, there is no basis for assuming that this responsibility would be

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submitting itself to the jurisdiction of the court of appeals and its order. Moreover, one need not be a party to a case to be subject to contempt for violation of a court's order. Where a person "is not a party and has not been served with a copy of the order, [he may be found in contempt if] * * * he had knowledge of the order * * * and with that knowledge committed a wilful violation of the order." *Walker* v. *City of Birmingham*, 181 So. 2d 493, 504, 279 Ala. 53, 64, affirmed, 388 U.S. 307, 312 n. 4; *United States* v. *Shipp*, 203 U.S. 563, 575; *United States* v. *Hall*, 472 F. 2d 261, 265-267 (C.A. 5).

The cases relied upon by *amicus* Chamber of Commerce of the United States (Chamber Br. 13) for its assertion that the Union could not be found in contempt of the instant order are distinguishable. In those cases the courts indicated that the contempt remedy could not be invoked against nonparties who "act independently [of the parties] and whose rights have not been adjudged according to law." *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 437. Here, on the other hand, the Union's rights were adjudged by the court below, and it is subject to the court's order.

breached by turning the tests over under the restrictions of the Board's order. Standard J2 (Pet. 12) states that test scores should "ordinarily be reported only to people who are qualified to interpret them" and that, if reported, the scores "should be accompanied by explanations." The "Comment" to J2 recognizes that it is an "unanswered" question whether untrained people should be given test scores, or only interpretations, and also notes that there is no definitive answer as to who within an organization should have access to scores, except that "curious peers" should not. The Union, as the duly certified representative of the employees, is certainly not a "curious peer" in processing under the collective agreement properly filed grievances.

3. Finally, there is no merit in the contention of petitioner (Pet. 13 n. 2) and APA (APA Br. 9-11) that APA's Code of Ethics, and state law (which incorporates the Code of Ethics), would be breached by compliance with the Board's order to provide the Union with the test scores of the applicants.[12] It is highly speculative that the Code of Ethics would in fact be breached by the Board's order. Two examples of breach cited by APA—the

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[12]APA also contends (Br. 12-13) that the Board's order violates privacy interests of the employees. No employee has raised any such objection. And, as this Court pointed out in *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767, in rejecting an employer's contention that disclosure of employees' names and addresses to unions conducting organizing campaigns would violate their privacy interests and subject them to harassment: "The disclosure requirement furthers [the objectives of the Act] by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present." And see *Whalen* v. *Roe*, *supra*, 429 U.S. at 602.

obligation to safeguard information about clients and the need "to protect examinees * * * from ridicule or harassment by their peers as a result of disclosure" (APA Br. 9)—are premised on APA's contention that the Board's order "disregards the interests of the employees in keeping their scores from becoming common knowledge among their fellow workers" (*ibid.*). Again, this merely takes issue with the judgment of the court below that the safeguards against improper dissemination in the Board's order and its enforcement decree are sufficient to prevent the scores from "becoming common knowledge." The third example rests on the unsupported assumption that a professional association will discipline a member who repudiates an assurance of confidentiality under order of a federal court. But, even if compliance with the federal law were to result in a breach of the APA's Code of Ethics and thereby state law, state law must, of course, give way to the paramount federal law. See *Nash* v. *Florida Industrial Commission,* 389 U.S. 235.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

THE DETROIT EDISON COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF OF PETITIONER

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IN THE

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No. 77-968

THE DETROIT EDISON COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals, dated August 10, 1977, is reported at 560 F.2d 722, and appears in the Appendix to the Petition for a Writ of Certiorari [1] at pp. 1a-12a. The Court's denial on November 22, 1977, of the petitioner's motion for rehearing appears in the Petition Appendix at p. 13a. The decision and order of the National Labor Relations Board, enforced by the Court of Appeals, is reported at 218 NLRB No. 147 (1975), and appears in the Petition Appendix at pp. 14a-17a. The decision of the Administrative Law Judge in this case appears in the Petition Appendix at pp. 18a-59a. The original opinion and award of the arbi-

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[1] The references to the Appendix to the Petition for Certiorari will be designated as "P.A." in this brief, while references to the Appendix prepared after the petition was granted will be designated as "A".

trator in the related arbitration proceeding, dated December 3, 1973, appears in the Petition Appendix at pp. 60a-76a, and the supplemental opinion and award of the arbitrator in that proceeding, dated October 22, 1974, appears in the Petition Appendix at pp. 77a-87a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 10, 1977. A timely petition for rehearing *en banc* was denied on November 22, 1977, and the petition for certiorari was filed within 90 days of that date. This Court granted the petition on March 27, 1978. This Court's jurisdiction is being invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the judicial interpretation of Section 8(a)(5) of the National Labor Relations Act requiring employers to furnish unions representing their employees with tests and test scores conflicts with Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(h)) and the guidelines of the Equal Employment Opportunity Commission on testing (29 C.F.R. Part 1607), which require, *inter alia,* that such tests and test scores not be divulged to unauthorized persons.

2. Whether Section 8(a)(5) of the National Labor Relations Act requires employers to furnish unions representing their employees with copies of tests and test scores used by employers in the selection of candidates for jobs requiring the aptitude to learn specific skills in circumstances where (1) the employer gave or offered to give the Union sufficient information to determine the validity of the tests, (2) the uncontradicted

expert testimony of the professional psychologists was that disclosure of the actual test questions to the Union would not be useful in determining the validity of the tests, and (3) the arbitrator involved in the grievance giving rise to this case, in construing the applicable collective bargaining agreement, found that production of the actual test battery was irrelevant to the arbitration proceeding and award.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> "Section 158(a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

United States Code, Title 42:

> "Section 2000e-2(h) . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

The EEOC Guidelines on Employee Testing are found at 29 C.F.R. Part 1607, and are reproduced in the Petition Appendix at pp. 88a-100a.

STATEMENT

Background

The Detroit Edison Company is a public utility engaged in the generation and distribution of electric

power in the State of Michigan (P.A. 19a). Since about 1943, the Utility Workers Union of America (Local 223), AFL-CIO, has represented certain employees of the Company. At the time of the hearing in this case, that Union represented employees in approximately 28 different appropriate units throughout the Company (P.A. 19a). One of these 28 units was a unit of operating and maintenance employees at the Company's then newly constructed Monroe Power Plant at which the Union was certified as exclusive bargaining agent on April 1, 1971 (P.A. 19a-20a). The Company and Union thereafter agreed that the Monroe Plant employees would be covered by the terms and conditions of a preexisting agreement between the parties effective from June 16, 1969, to June 12, 1972 (P.A. 20a).

In late 1971, the Company determined that six positions in the classification of Instrument Man B should be filled at the Monroe Power Plant. The job description of the Instrument Man job reveals that an incumbent on this job "installs, maintains, repairs, calibrates, tests and adjusts precision instruments in power plants" (A. 358.) This includes automatic control systems which control boilers and their associated equipment and the maintenance of both mechanical and electrical tripping and alarm devices (A. 358-359). The job description also states that, "Fairly frequent opportunity to cause extremely serious operating conditions from misjudgment or erroneous action exists" (A. 359-360). As Mr. Kanous testified, the Instrument Man is a "key" job in the plant and is "extremely important to the plant's operation, both in staying in operation and operating efficiently when it is in operation" (A. 210), and that he has the responsibility "to actually keep that system on the line or put it back

essentially without assistance" (A. 212). He further testified that the Instrument Man "can create situations which are extraordinarily hazardous to other employees or the equipment that he's working on" (A. 310). For the foregoing reasons, as found by the Administrative Law Judge, the Company considers this to be a critical job "because it is involved with maintenance of plant instrumentation, vital to the operation of the plant . . . ." (P.A. 20a).[2]

The posted requirements for this job were (1) satisfactory high school credits for 2 years of math and 1 year of science, (2) a satisfactory physical examination, (3) a minimum of "recommended" in the required Instrument Man aptitude test administered by the Company, and (4) a satisfactory attendance record (P.A. 20a).

Ten Monroe plant employees bid for the job, but all were rejected because they failed to achieve a "recommended" score on the battery of aptitude exams. Over 30 employees from other plants covered by the Union contract were then considered. One incumbent instrument man from another location was selected without the necessity of taking the test, and the remaining five positions were filled by the five most senior applicants who achieved a "recommended" score on the aptitude tests (P.A. 21a).

---

[2] Likewise, the arbitrator in the arbitration proceeding concerning the Union's grievance over the Company's failure to promote the Monroe Plant applicants, found that "There is no question that the Instrument Man job is one of critical importance and requires long training" (P.A. 71a).

The Grievance

On January 17, 1972, the Union filed a grievance claiming a violation of Article VIII, Section 38 of the collective bargaining agreement over the failure to award the Instrument Man job to the Monroe Plant bidders (A. 120). Article VIII, Section 38, of the agreement provided that:

> "a. If a vacancy occurs in any one of the bargaining units covered by this Agreement and such vacancy is not filled by promotion or transfer within the group, a notice of such vacancy shall be posted for a period of five (5) days in the bargaining unit in which it occurs and a copy sent to a Union divisional officer designated by the respective division.
>
> b. If such a vacancy is not filled by a member of the bargaining unit, notice of the vacancy shall be posted in other bargaining units of the same department for a period of five (5) days. If the reasonable qualifications and abilities of the employees being considered as a result of this posting are not significantly different, total length of service in the Company shall govern. 'Significant difference' shall be 'head and shoulders difference', and such factors as advance licenses or step-up experience shall not of themselves amount to significant differences." (A. 117-118).

The grievance was processed through each of the contractually agreed upon steps of the grievance procedure (A. 141-154)

The Company's final answer in the grievance procedure, prior to the invocation by the Union of the right of arbitration, denied the grievance, but ended with the following recommendation:

> "It was evident that the Union does not have a complete understanding of test validation, establishment of standards, development of test batteries and similar information relating to the Company testing program. To that end, I am directing that a meeting for Union Officers and Chairmen be arranged to enhance their understanding of the Company's objectives in the testing area. A mutually acceptable date will be worked out prior to November 1, 1972." (A. 153).

Thereafter the grievance continued toward arbitration after the local union president termed the offer quoted above to be "completely unacceptable to the Union" (A. 154). On March 5, 1973, the Union for the first time made the following requests for information:

> "1. The actual battery of tests used in the captioned matter.
>
> 2. The method of scoring or grading and the actual criteria for finding 'acceptability' or 'recommended' or 'Not Recommended'.
>
> 3. A report on the test validation.
>
> 4. A report by the National Compliance Company which, as I understand it, consulted upon, and reviewed the Company's whole testing system or apparatus." (A. 121).

Company counsel responded to this letter on March 15, 1973, arranging a meeting between Union representatives and Company representatives to discuss and explain the entire testing procedures, but declined to release the actual test battery (A. 122).

Thereafter, on April 2, 1973, Company counsel (Mr. Houghton), its director of union relations (Mr. Ruch) and its industial psychologist (Dr. Roskind) met with

Mr. Lewis for the Union, explained the entire testing program and procedures to him, and supplied him with the Company's validation study for the Instrument Man B test battery (A. 343-353),[3] as well as a validation study of the same test battery by an outside consultant, the National Compliance Company (A. 354-378).

The Company declined to give the Union the actual test batteries, test papers or test scores of the applicants who took the test.

Two days after the April 2, 1973, meeting with the Company, the Union filed charges with the Labor Board giving rise to this case (A. 104-106).

The Tests

The Company has used aptitude tests in an attempt to predict job performance since the late 1920's or early 1930's (A. 75, 178-179). These tests do not measure current knowledge and skills relevant to the job, but rather the person's ability to learn such knowledge and skills. In 1958, a test battery was developed for the job of Instrument Man (A. 75-76; 179). In the 1956-1957 period, after the Company reviewed earlier studies by industrial psychologists of what instrument men actually do and checked with other sectors of industrial experience where similar jobs were performed, it appeared that there were four tests that had some possibility of predicting job success of the Detroit Edison Instrument Man. Out of these four, three were

[3] A test "battery" is two or more tests used in combination to arrive at a selection decision (A. 224).

picked for a validation study (A. 188-189).[4] These were the Personnel Test, the Minnesota Paper Form Board (MPFB) and the Engineering and Physical Science Aptitude Test (EPSAT) (A. 189). At that point, incumbent instrument men (1) were given the three tests on an experimental basis and (2) independently ranked by their supervisors in terms of their ability to do the various job functions of the Instrument Man job. A positive correlation between demonstrated ability to perform the Instrument Man job and higher scores on the three tests was shown to exist (A. 190).

In the 1969-1970 period, the Instrument Man battery of tests was again validated by the Company's industrial psychologists because "the technical engineers of the power plants recognized the need for some improvement in the selection test battery" (A. 344). The steps taken in that revalidation study were the following:

1. The plant engineers were instructed to arrive at a series of specific job functions of the Instrument Man, which were a representative sample of the tasks performed and which ranged from comparatively simple to complex (A. 233). Twenty-three (23) such tasks were selected and they are specified in the validation report (A. 352-353).

2. An evaluation procedure was devised whereby each of the 43 incumbents on the job, who had taken the Instrument Man battery of tests, would be rated

[4] A validation study is a systematic research study to determine whether or not there is a relationship between test performance and job performance.

by their supervisors on each of the 23 objective job tasks as to whether each could perform the task either (a) without assistance, (b) with minor assistance, or (c) with major assistance (A. 233-234; 345).

3. Using these parameters, at least two supervisors independently rated each of the incumbents on each of the 23 items. Where there was no supervisory consensus on the incumbent's performance in the 23 areas being studied, the results of such evaluations were discarded. This happened in the case of ten of the incumbents (A. 234-235; 346), leaving 33 incumbents in the study.

4. The performance figures were then correlated with the test scores. Using the three tests, the multiple correlation between tests and performance was +.73 (A. 347). The correlation coefficient measures how successful the test battery is in predicting job success. If the correlation were +1.0, the test would be perfectly predictive of job success (the high scorers would all be high performers). If the correlation were −1.0, the test would be perfectly predictive in the opposite direction (the high scorers would all be poor performers). If the correlation were 0, the test battery would be indicative of neither success nor failure on the job. The test scores would have no predictive value and their relationship to either job success or failure would be one of pure chance.

Taking the Personnel Test out of the battery, the correlation coefficient was only reduced to +.71 (A. 347). Since it added so little to the validity of the test battery, the Personnel Test was removed as a result of the 1970 revalidation (*Ibid*).

The uncontradicted testimony of the professional industrial psychologists was that a correlation coefficient of +.71 was unusually high in terms of predicting successful job performance. Thus Doctor Roskind, the Company's Director of Industrial Psychology, testified that "you very, very seldom find a correlation of a test . . . anywhere near as high as .7" (A. 238). Mr. Kanous, the Company's Director of Employee Training, testified that a +.71 correlation was "very high", and that generally, useful correlation coefficients would be in the +.3 to +.6 range (A. 206).

In addition, as a result of the 1970 revalidation, the previous three-tiered scoring of (1) "not recommended", (2) "acceptable", and (3) "recommended" was dropped in favor of a two-tiered system of "not recommended" and "acceptable", and a slightly higher cut-off score of 10.3 was determined to be appropriate (P.A. 64a). The cut-off score of 10.3 was derived from a scatter plot (A. 349) showing both supervisory evaluation of individuals in the study and their test scores. As testified to by Doctor Roskind:

> "After you've placed all this information on the scatter plot, what you do is place the cutoff score so that it will operate most effectively and you will make the least number of mistakes in predicting poor performance and in predicting good performers on the job" (A. 99).

The scatter plot showed, and the Arbitrator found, that 13 of the 16 above-average performers on the job scored 10.3 or better and that 14 of the 17 below average performers on the job scored less than 10.3 (P.A. 74a; A. 349). Stated another way, those scoring 10.3 or better had an approximately 80% chance of becoming successful instrument men, and those scoring

below 10.3 had an approximately 80% chance of becoming unsuccessful instrument men (A. 238).

The content of the Minnesota Paper Form Board and the EPSAT was not changed in any way as a result of the 1970 revalidation (A. 236).

The Minnesota Paper Form Board Test is a single undivided aptitude test that has been used for many years to predict the ability to visualize in three-dimensional space (A. 193-195).

The Company introduced into the record of the arbitration and of this case ten samples of the kind of questions appearing in the MPFB (A. 400-402).[5]

The EPSAT is an aptitude test which is divided into six parts:

1. Mathematics. This measures the applicant's facility with addition, subtraction, multiplication, division, fractions, ratios and proportions, and a small amount of algebra and geometry (A. 199). Examples of the actual type of question posed in the mathematics section of the EPSAT were introduced in the record of the arbitration and of this case and can be found at A. 384-385.

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[5] These sample questions, as well as the sample questions depicting the six part EPSAT Test, which the Company furnished the Union, were not items taken from the actual tests, but rather from a special test, the Multi Aptitude Test (MAT). This test was specifically developed for training psychology students and others and is used to demonstrate the majority of questions which appear in the MPFB and EPSAT. In cases where the MAT did not contain questions similar to several sections of the EPSAT, the Company obtained additional questions from the public domain or developed questions to illustrate the type of items found in the actual test (A. 192-193; 215-216; 379-426).

2. Formulation. This measures the facility with which a person can take a verbal problem and express it in a formula-type way (A. 199). Examples of the actual type of question posed in the formulation section of EPSAT were introduced in the record of the arbitration and of this case at A. 403.

3. Physical science comprehension. This measures aptitude for solving physics-type problems including application of physical concepts such as reflectivity, retention of heat, displacement and the like (A. 201). Examples of the kind of question posed in this section of EPSAT were introduced into the record of the arbitration and of this case at A. 403.

4. Arithmetic reasoning. This measures aptitude to reason in a deductive way (A. 202-203). Examples of the kind of question posed in this section of EPSAT were introduced in the arbitration and in this record at A. 405-413.

5. Verbal comprehension. This measures the ability to use language effectively in a physical science context (A. 203). Examples of the kind of question posed in this section of EPSAT were introduced in the arbitration and in this record at A. 380-381.

6. Mechanical comprehension. This measures the ability to apply mechanical principles of levers, gears, center of gravity, etc. (A. 203). Examples of the kind of question posed in this section of EPSAT were introduced in the arbitration and in this record at A. 391-393.

The Instrument Man battery of tests was again studied—together with other job test batteries—in 1972 by an independent organization known as the

National Compliance Company (NCC). The conclusion of the NCC study was that:

> "It has been reported above that the total test battery is statistically significantly related to the two criterion variables for the job of Instrument Man. The test battery appears to be effectively selecting men who will perform better as Instrument Men" (A. 367)

The Company administers the tests to applicants with the express commitment that each applicant's test scores will remain confidential (A. 85, 445). The Company insures test and test score security by keeping the tests and test scores under lock and key in the offices of the Company's professional industrial psychologists who have an ethical commitment under the American Psychological Association's Code of Ethics* not to disclose the tests or test scores to unauthorized persons (A. 82-83, 438). Under this policy the Company's industrial psychologists do not disclose tests or report actual test scores even to members of management (A. 77, 83, 91, 127).

The 1972 Collective Bargaining Negotiations

The Company and Union engaged in collective bargaining negotiations in 1972 to negotiate a successor agreement to the 1969 agreement. At the second meeting in these negotiations on April 20, 1972—exactly four months after the Union filed the grievance concerning the Instrument Man test—the Union proposed the following to the Company:

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*The APA Code of Ethics is expressly incorporated in the statutory codes of over twenty states, including the State of Michigan. Mich. Stat. Ann. § 14.677(1)(b) (1976).

> "The Union shall be furnished copies of all tests given to employees. Union shall have the right to review all test results. All tests shall be job related and only for the job or position applicable" (A. 164).

The Company rejected this proposal on May 9, 1972, and advised the Union that acceptance of its proposal "would destroy the testing program" (A. 165). On May 18, 1972, when the subject came up again, the Company again rejected the Union's demand for the tests and test scores on the basis that nothing in the contract gave the Union a right to access to this information, but offered to have its industrial psychologists discuss with the Union the integrity of its testing program (A. 168). The Union responded that it was interested in hearing the Company's explanation of its testing program after the conclusion of negotiations. There was no change made in the 1972 contract as a result of the Union's demand for the tests and test scores. The Company did hold a meeting with the Union in the Fall of 1972 to explain its testing program in accordance with the contractual commitment that it made in the negotiations (A. 168-169).

The Arbitration

After filing the charge with the Labor Board leading to this case on April 4, 1973, the Union in preparation for the arbitration sent a memo to the Arbitrator on May 23, 1973, requesting the Arbitrator to direct the Company to furnish the Union with copies of the actual tests, or to subpoena the tests (A. 123-124).

On the same day the hearing opened before Arbitrator Jones. The original arbitration hearing took place on May 23, 24, 30 and 31, 1973.

In the course of this hearing, as noted in part above, the Company furnished the following information:

1. Its 1970 validation study.

2. The 1972 NCC validation study.

3. Explanations of the MPFB and each of the six parts of EPSAT.

4. Representative sample questions showing the type of question appearing on the MPFB and on each part of the six-part EPSAT.

Also during the course of the five-day hearing, the Company offered to turn over to the Union test scores of any employee who would sign a waiver releasing the Company psychologist from his pledge of confidentiality (A. 7).[7] Finally, the Company disclosed test scores of applicants taking the test battery without tying the score to the applicant's name (A. 279-280).

Nevertheless, on June 2, 1973, two days after the close of the original hearing, Mr. Lewis for the Union wrote the Company stating:

> "Inasmuch as I am writing you, and after much deliberation, I find I cannot withdraw my request for the actual tests, scores, and weights. While the Company has made samples for me, and I appreciate that, and while it gave scores without revealing names, I have the problem of knowing the weights in the 6 parts of the EPSAT test—the total weight of EPSAT—then the weight of Minnesota Form Board—then how the various parts fit together to form the possible apex of 15.3 in the upper limit, quite apart from the 10.3 cut off score." (A. 125-126).

[7] The Union flatly refused to determine whether the employees it represented would want their raw scores divulged to the Union (A. 44).

This request was answered by the Company on July 10, 1973, in which the Company responded affirmatively and in detail to the Union's requests concerning the battery weights and scoring mechanisms while again declining to give the Union the test battery and the scores linked with the names of the examinees (A. 127-131).

After the close of the initial hearing, the Arbitrator ruled on the Union's request and held that he lacked the power to require the Company to produce a copy of the tests and the scores achieved by applicants taking the tests (P.A. 67a). At the same time, the Arbitrator invited the Union to produce case citations demonstrating that such information should be furnished, but the Union declined to do so (*Ibid.*).

In view of the dual pendency of both the Union's charge before the Labor Board and the case before the Arbitrator, the Company and Union on August 6, 1973, jointly advised the Arbitrator of the situation, and concluded that the arbitration proceeding should not await a final decision by the Board or its enforcement by a Court of Appeals (A. 138-139).

The Arbitrator thereafter closed the hearing in the case on August 18, 1973, and rendered his decision on December 3, 1973, finding that the Company did not violate the Agreement by establishing an acceptable score on the tests as a qualification for the job, but directing the Company to re-examine employees with scores between 9.3 and 10.3 to determine whether their lower scores were offset by relevant educational or job experience (P.A. 76a).

In compliance with the award, the Company re-examined three of the Monroe applicants who had scored between 9.3 and 10.3 on the tests and subsequently promoted one such employee who had a background which might tend to offset his failure to achieve the 10.3 score, but again rejected two others (P.A. 39a). The Union protested the failure to promote the Monroe applicants who were rejected and a supplemental hearing was held before the same Arbitrator on July 18, 1974, to determine whether the Company had complied with the original award. The transcript of that hearing is also included in the record in this case (A. 331-342). In a supplemental decision the Arbitrator found that the Company had complied with the award (P.A. 77a-87a).

In the course of the Arbitrator's original decision based on four days of hearing on the issue of testing, he made several findings not disputed by the Administrative Law Judge, the Board, or the Court of Appeals, which are relevant to the disposition of this case:

1. He found that the Company had the right under the contract to establish minimum reasonable qualifications for the job of Instrument Man (P.A. 70a-71a).

2. He found that:

> "There is no doubt that the Company has established and maintained the right to use tests as a measure of an employee's qualifications—the Union concedes this point." (P.A. 71a).

3. He found that:

> "[T]he test [battery] is what the Company claims it to be—a reliable valid test with a correlation coefficient of .72. There is also no question that it

> is a 'fair test' in the sense that its administration and scoring have been standardized." (P.A. 72a-73a).

4. He found that:

> "There is no doubt that as tests go, this particular test has a high degree of validity. The way in which it was developed and is used also overcomes many of the objections raised by arbitrators and industrial relations practitioners; that is, the test was developed especially for this job (job related), and has been properly validated. In addition, and very important, the instant test is not used to compare one employee against another in terms of scores attained . . . This problem is eliminated by reporting scores in terms of 'not recommended' and 'accepted'." (P.A. 73a).

5. Addressing himself particularly to the Union's attempt to attack the test by attacking individual sample questions or items on the test as being themselves not related to the work of the Instrument Man, the Arbitrator stated:

> "The Union questioned the validity of the test by reference to the type of questions asked. It was to further this line of questioning that the Union desired a copy of the test. But this was simply a questioning of the face validity of the test. Such questions, even if taken from the test itself, prove nothing. Face validity does not prove or disprove the validity of the test in determining the aptitudes necessary for successful job performance." (P.A. 72a).

6. Additionally and most significantly, he found that:

> "In short, the Arbitrator does not believe that the Union's position was damaged in any way by lack of access to the test" (P.A. 72a).

In conclusion, the Arbitrator found that the attainment of a 10.3 score created a presumption of "significant difference" as provided for in Article VIII, Section 38, of the parties' agreement, over those failing to obtain such a score unless those scoring between 9.3 and 10.3 had relevant educational or job experience which might tend to offset their failure to achieve the 10.3 score.

The Unfair Labor Practice Case

The hearing in the unfair labor practice case took place on September 23, 1974. As noted above, the entire 690-page transcript of the original arbitration case, as well as the transcript of the supplemental hearing before the Arbitrator, were introduced in the record before the Administrative Law Judge.

In the proceeding before the Administrative Law Judge the Company made two further and significant efforts to be responsive to the Union's requests and the General Counsel's Complaint. At the outset of that hearing, the Company's counsel stated:

> "The Company has offered to do two things to appease the Union in this case. One, our position is we would be willing to disclose these tests to a qualified industrial psychologist for his perusal, for a determination on behalf of the Union. We have also indicated to Mr. Lewis, the spokesman for the Union, that we would permit him to take the test himself" (A. 6)

In addition, at the hearing two professional psychologist witnesses—one of them an outside consultant, Dr. Marvin Dunnette—testified without contradiction that disclosure of the actual items on the test battery to the

Union would not be useful in determining the validity or fairness of the test battery (A. 50-51, 71-72, 79).

The Board's Administrative Law Judge in a decision rendered on January 29, 1975, ordered that the battery of tests and actual test sheets not be disclosed to the Union directly, but rather to a qualified psychologist of the Union's choice who would be free to consult with the Union and show the Union the tests and test sheets to the extent necessary to process a Union grievance over promotion to the Instrument Man classification, but not to permit the Union to copy the test or otherwise disclose the test to those who may have taken the test in the past or might take it in the future. He further ordered that the Company disclose to the Union directly the test scores achieved by each specifically named employee to whom the test battery was administered.

Inasmuch as the Company at the outset of the unfair labor practice hearing had offered to show the battery of tests to a qualified psychologist of the Union's choice "to appease" the Union, the Company did not except to that portion of the decision of the Administrative Law Judge, but did except to his proposed order that the raw test scores of employees to whom the battery of tests had been administered be turned over directly to the Union. The Union excepted to the requirement that the test battery be disclosed to a qualified psychologist of the Union's choice rather than to the Union directly.

The Board in a two to one decision upheld the Union exception and ordered that all the test materials in-

volved be disclosed to the Union directly. The Board concluded that:

> "While we are making the tests available directly to the Union, we shall, in order to preserve their future utility, impose the same restrictions upon their use by the Union as recommended by the Administrative Law Judge" (P.A. 16a).[8]

Former Member Kennedy would have affirmed the decision of the Administrative Law Judge in its entirety, noting that:

> "There is no professional obligation on the part of the Union not to publicize the tests or their results. I do not see how the Board can enforce its exhortation not to copy or disclose the tests" (P.A. 17a).

The Decision of the Court of Appeals

The majority decision of the panel of the Court of Appeals enforced the Board's order in all respects.

In answer to the Company's concern about dissemination of the tests by turning them over to the Union directly, the majority merely referred to the provision

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[8] Specifically, the restrictions imposed by the Administrative Law Judge were the following:

> "[T]he Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past or may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests. After the conclusion of the arbitration proceeding, or if no request is made to reopen the arbitration hearing within 90 days after the psychologist receives the battery of tests, all copies of the battery of tests shall be returned to Respondent" (P.A. 55a-56a).

in the Board decision quoted above purporting to impose a restriction on the dissemination of the test materials. In answer to the Company's concern that turning raw test scores, linked with the names of the persons taking the tests, and actual test papers of the applicants directly to the Union would involve the Company in a breach of an express pledge given to each of the persons taking the tests that the results of the test would not be disseminated, and subject such persons to needless embarrassment, humiliation and harassment, the majority of the Court simply cited its decision in *General Electric Co.* v. *NLRB*, 466 F.2d 1177 (6th Cir. 1972), holding that wage information received by the Company from other companies on a confidential basis and used as a part of a wage survey to determine rates of pay for employees of the Company must be disclosed to the Union.

Finally, in answer to the concern of both the Company and the American Psychological Association (herein referred to as APA) as *amicus curiae* that disclosure directly to the Union of the test materials would involve the Company psychologists in a violation of their professional ethical code, the majority of the Court simply found that "the principles which underlie the National Labor Relations Act are paramount in this case" (P.A. 8a).

Circuit Judge Weick filed a dissenting opinion in which he concluded that the Board had not followed the standard used in *Kroger Co.* v. *NLRB,* 399 F.2d 455 (6th Cir. 1968), of recognizing and adequately protecting each of the conflicting interests involved. He found that the Board order recognized only the interest of the Union and that its order "constituted a gross abuse of discretion" (P.A. 12a).

Judge Weick pointed out the several Company efforts to accommodate the Union's interest in the Company's test program and concluded that such information was "sufficient to permit the union to process adequately the grievance before the Arbitrator, or to perform its duties under the collective bargaining agreement" (P.A. 11a). To the majority opinion's claim that dissemination of the test materials was adequately protected by the Board's Order, Judge Weick found such reasoning to be "really naive" and quoted, with approval, former Member Kennedy's analysis in support of this conclusion (P.A. 11a).

In addition, Judge Weick found that disclosure of the test materials would involve the Company psychologists in a violation of the Code of Ethics of the APA, which has been recognized by the statutes of the State of Michigan, and that disclosure of the test scores and test papers linked to the name of the person taking the test constituted an invasion of a confidential and privileged relationship between the psychologists and the examinees.

SUMMARY OF ARGUMENT

1. Disclosure to the Union of the Test Materials Would Destroy the Validity and Future Usefulness of the Tests.

The disclosure of tests and test scores to unauthorized, non-professional persons is in contravention of Standards I5 (tests) and J2 (test scores) of the American Pychological Association's "Standards for Educational and Psychological Tests and Manuals", which prohibit disclosure of aptitude tests and test scores to unauthorized persons because prior knowledge of specific test items by individuals who are to take the test in the future destroys the validity of the test. These

APA standards have in turn been incorporated into the Equal Employment Opportunity Commission's "Guidelines on Employee Selection Procedures" promulgated under Section 703(h) of the Civil Rights Act of 1964, which permits employers to give and act upon the results of professionally developed ability tests, provided that the tests are not used to discriminate. The EEOC Guidelines on Testing, and particularly their incorporation of the APA Standards have, in turn, received the explicit approval of this Court on at least three occasions. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 430-31 (1975); *Washington* v. *Davis*, 426 U.S. 229, 250, fn. 16 (1976).

The Court of Appeals for the Second Circuit has held that production of aptitude tests to members of an affected class of minority employees who would be taking the test in the future in competition with others would not be approved because advance inspection of the tests by the class members would place all others at a competitive disadvantage. *Kirkland* v. *Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975).

Because of the "unique character" of aptitude tests, the Labor Board in its forty-three year history of administration and interpretation of Section 8(a)(5) has never before required employers to furnish unions with test questions, and on at least one occasion its General Counsel has even refused to issue a complaint seeking the production of test questions on the basis that advance inspection of the test would permit their content to be widely disseminated and thus impair the usefulness of the test. *International Telephone & Telegraph, Federal Division*, Case No. SR 657, 46 LRRM 1387 (1960).

The invention by the Labor Board of a "restriction" seeking to limit the Union's dissemination of the tests to other employees who may take the tests in the future is unworkable and unenforceable. Once control of the tests passes to a person or persons with no professional obligation against disclosing the tests to others, the security and thus the validity of the tests have been hopelessly compromised in accordance with the APA Standards. The "restriction" places an impossible burden on the Company of seeking to police the "restriction". Even if the Company were able to detect a deliberate violation of the "restriction", it has no independent right to seek contempt proceedings in the Court of Appeals since that right resides solely with the Labor Board. It is also highly doubtful whether a Union which violates the "restriction" could be found in contempt at all since the order of the Labor Board runs against the Company and not the Union, which was not even a party to the enforcement proceeding in the Court of Appeals. Even if the Company were able to detect a deliberate violation of the "restriction" and even if the "restriction" were in some way enforceable against the Union, there is no adequate remedy for the violation since the Company's tests would be invalidated and it would take years to validate a new test battery.

Even if the Union did not deliberately or inadvertently violate the "restriction", the disclosure of the tests to "the Union" invalidates the tests since "the Union"—however that term is construed—consists of employees who change on a regular basis due to Union elections and who well might take the tests in the future. Additionally, disclosure of the test questions could result without a violation of the "restriction" from a

public arbitration or court proceeding in which the questions were revealed.

For all these reasons it is simply naive, as dissenting Judge Weick found, to believe that a hortatory "restriction" will prevent intentional or inadvertent disclosure of the tests to those who might take the tests in the future.

2. Disclosure to the Union of the Test Materials Is of No Probable Relevance or Usefulness to the Union in Pursuing Its Statutory Functions.

Even under the broad "discovery type standard" approved by this Court in *NLRB* v. *Acme Industrial Company,* 385 U.S. 432 (1967), the Company had no obligation to furnish the Union the test battery and test scores linked to the names of the examinees, because the materials have no probable relevance or usefulness to the Union.

In the course of this proceeding the Company furnished the Union with what dissenting Judge Weick found was a "wealth of material" on its testing program. This included furnishing the Union with two validation studies done on the test battery, written explanations of the tests and scoring weights of the tests, generous samples of test questions on each of the tests and subparts of the EPSAT Test, and the test scores of all applicants without linking the applicant's name to the score. In addition, the Company offered to disclose to the Union the score of any applicant willing to have his score divulged and to disclose the test battery to a qualified psychologist of the Union's choice.

In light of the above information, the three professional psychologists testifying in this case concluded

without contradiction that disclosing the test battery itself to the Union would not be relevant or useful to the Union in determining the validity of the test battery. In addition, the Arbitrator who decided the underlying arbitration case concluded that providing the Union with the actual test battery would "prove nothing" and that "the Union's position was not damaged in any way by lack of access to the test".

With respect to the test scores linked with the name of the applicant, there was absolutely no evidence in the record that such information was of any probable relevance or usefulness to the Union. Contrary to the Board's finding, the Arbitrator did not conclude that the Union needed all the scores linked with the names of all the applicants to police the agreement. Rather, he concluded that the Company had discharged its obligation by disclosing to the Union the names of the three applicants who had scored between 9.3 and 10.3. There are, moreover, compelling reasons against disclosure of test scores. All test applicants are given an express pledge of test score confidentiality before they take the test and disclosure of actual test scores would not only breach that pledge but would subject those scoring low on the test battery to needless embarrassment and humiliation. In addition, there is an emerging Congressional recognition and protection of the right of individuals against disclosure of private and personal information such as their aptitude test scores.

3. A Proper Balance of the Conflicting Interests Involved, as Well as Overriding Principles of Federal Labor Law, Require That the Test Materials Not Be Disclosed to the Union.

The Court of Appeals failed to apply the principle established by this Court in *NLRB* v. *Truitt Mfg. Co.*,

351 U.S. 149, 153-54 (1956), that "the inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met", as well as the principle established by this same Court of Appeals itself in *Kroger Co.* v. *NLRB,* 399 F.2d 455, 457 (6th Cir. 1968), that "the critical problem appears to be how to recognize and how adequately to protect each of the conflicting interests that are involved here".

In the present case, if there were any real analysis of "the circumstances of the particular case" or any real balancing of the "conflicting interests" involved, it would have become obvious that in balancing the lack of probable relevance or usefulness of the test materials to the Union with the probability of invalidation of the Company's entire testing program by disclosure of the materials that the balance in the circumstances of this particular case should have been struck in the Company's favor.

Two other policies of federal labor legislation support this balance. First, the policy favoring final and binding resolution of contract disputes by arbitration as set out by this Court in the *Steelworkers Trilogy* is served by not disclosing the test materials since the Arbitrator ruled that the materials were irrelevant to his resolution of the dispute. Thus, far from aiding the arbitral process, as was found to be the case with the information sought by the Union in *NLRB* v. *Acme Industrial Company,* 385 U.S. 432 (1967), the information in the present case has already been found to be irrelevant to the arbitration process. Secondly, this Court has had previous occasion to remind the Labor Board that it should construe the Act in a manner consistent with other equally important Congressional ob-

jectives and should not pursue the policies of the Act so single-mindedly that it conflicts with other legislation. *Southern Steamship Co.* v. *NLRB,* 316 U.S. 31, 47 (1942); *Emporium Capwell Co.* v. *Western Addition Community Org.,* 420 U.S. 50, 66 (1975). The novel construction of Section 8(a)(5) of the Act by the Labor Board here clearly conflicts with the equally important Congressional objective of assuring that tests used in job selection decisions be valid and nondiscriminatory.

ARGUMENT

I

Disclosure To The Union Of Job-Related Aptitude Tests, Test Scores Linked With The Name Of The Applicants And Test Sheets Of Applicants Would Destroy The Future Validity Of The Tests

The argument made in this section of the brief assumes, solely for purposes of argument, that disclosure of the test materials to the Union in connection with the arbitration proceeding had some degree of probable relevance and usefulness to the Union in carrying out its statutory obligations, and would, thus, arguably be subject to production under the "discovery-type standard" enunciated in *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432 (1967), were it not for the unique character of the test materials involved and the Company's inability to continue a valid testing program under Title VII of the Civil Rights Act of 1964, while at the same time disclosing the test materials to the Union. In Part II of this Argument, the issue of the irrelevance and lack of usefulness to the Union of the test materials at issue here will be addressed under the standard set by this Court in the *Acme* case.

1. The Violation of EEOC Guidelines on Testing Inherent in Disclosure of the Test Materials to the Union

As shown in the petition for certiorari in this case, testing is a major employee selection device in both American industry and in the federal government itself (Petition, pp. 9-10). Disclosure to unions of tests and test sheets of named applicants will result in a widespread invalidation of testing programs as a selection device for applicants for employment as well as for selection of existing employees to fill jobs of admittedly critical importance, as is the case here. As dissenting Judge Weick correctly observed, "It's [the Company's] testing program has been nullified by the action of the Board" (P.A. 11a-12a).

This invalidation occurs because disclosure of the test materials to "the Union" naturally leads to disclosure and, therefore, foreknowledge of the actual items on the tests by some or all of the persons who will take the tests in the future, as will be demonstrated shortly in this brief.

Assuming, however, for the moment, the premise of foreknowledge of the actual test items by those who are to take the test in the future by disclosure of the tests to "the Union", the conclusion of the practical and legal invalidation of the testing program is easily established and was not really controverted by the Board or the Court of Appeals.

As a practical matter, it is evident that such foreknowledge will result in a situation where the high scorers on the test will reflect not the aptitude of the examinees to perform the job, but rather the extent of

their familiarity with the items on the test and their ability to memorize the "right" answers.

As a legal matter, such foreknowledge invalidates the test battery under civil rights laws, particularly Title VII of the Civil Rights Act of 1964. Section 703(h) of that Act permits employers to give and act upon the results of professionally developed ability tests, provided that the test or its administration is not designed, intended or used to discriminate. Under the mandate of Section 703(h), the EEOC has developed "Guidelines on Employee Selection Procedures",[9] which begin with the proposition that:

> "properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies . . . ." 29 C.F.R. § 1607.1 (P.A. 88a-89a).

This Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), approved this general philosophy on testing by noting that:

> "Nothing in the Act precludes the use of testing or measuring procedures; *obviously they are useful.* . . . Far from disparaging job qualifications

[9] On December 30, 1977, the EEOC, Civil Service Commission, Department of Justice and Department of Labor jointly issued a notice of proposed rulemaking on "Proposed Uniform Federal Guidelines on Employee Procedures", which are still in the rulemaking process. The proposed guidelines state that:

> "These guidelines are based upon, combine, and supersede all previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, the practical experience of the agencies, as well as standards of the psychological profession. These guidelines are intended to be consistent with existing law" Sec. 1(c).

> as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract" 401 U.S. at 436. (Emphasis added).

Under the heading of "Minimum Standards for Validation" of tests, the Guidelines state that evidence in support of a test's validity must be based "on studies employing generally accepted procedures for determining criterion related validity, such as those described in 'Standards for Educational and Psychological Tests and Manuals' published by the American Psychological Association . . ." 29 C.F.R. § 1607.5 (P.A. 92a-93a).[10]

Standard I5 of the APA Standards referred to in the EEOC Guidelines cited above and the proposed joint agency guidelines states the following:

> "I5.The test user shares with the test developer or distributor a responsibility for maintaining test security.
>
> Comment: Test security is a problem whenever a lapse in security can result in changing an individual's score without making a change in his true

[10] The proposed joint agency guidelines referred to above state the same proposition in the following manner in the section entitled "General Standards for Validity Studies":

> "These guidelines are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association and the National Council on Measurement in Education (American Psychological Association, Washington, D.C., 1974 (hereafter 'APA Standards')) and standard textbooks and journals in the field of personnel selection". Sec. 5(c).

> score. For some kinds of tests a lapse of security would not be serious. If one is to be tested for achieved skill, for example, knowing and practicing the test samples might be highly recommended. In many cases, however, prior knowledge of test items or scoring procedures could destroy validity. The problem is not simply one of cheating. Security may be compromised where examinees have had much prior experience with a popular test, have been taught specific test items, or have heard a lot about the test". Standards for Educational & Psychological Tests, published by the American Psychological Association (1974). p. 67.

It is undisputed on this record that the test battery in issue is not a test for achieved skill, but rather an aptitude test where "prior knowledge of test items could destroy validity." It is also undisputed that the individual questions on the Instrument Man test battery are identical each time the test is administered and that there are no variations or substitutions of test items (A. 78).

Standard J2 of the same APA Standards cited in the EEOC and proposed joint agency guidelines states the following:

> "J2. Test scores should ordinarily be reported only to people who are qualified to interpret them. If scores are reported, they should be accompanied by explanations sufficient for the recipient to interpret them correctly.
>
> Comment: There are difficult problems associated with the question of who should have access to test scores within an organization. Certainly, curious peers should not have access to them. An individual who must make the ultimate decision to admit or to reject or to hire or to reject, or to certify or not to certify, must have the interpretation. One

> useful (and unanswered) question is whether such a person who lacks the training necessary for the interpretation of scores should be given that training or should be given only the interpretations of scores." Id. at p. 68.

By turning over the test scores to unions and thereby to the employees represented by the unions, access to the test scores is thereby given to "curious peers".

In addition, the EEOC Guidelines on testing expressly provide for test score security. Section 1607.5 (b)(2) states that:

> "Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures" (P.A. 94).

This Court on at least three recent occasions has held that the EEOC Guidelines on Employee Testing are entitled to "great deference" and to be regarded as "expressing the will of Congress." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 433-34 (1971); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 430-31 (1975); *Washington* v. *Davis,* 426 U.S. 229, 250 n. 16 (1976). In the *Albemarle* case the Court expressly noted with approval that the EEOC Guidelines "draw upon and make reference to professional standards of test validation established by the American Psychological Association", 422 U.S. at 431.

One Court of Appeals already has held that it is inappropriate to disclose tests to employees who may take the tests in the future in competition with others. In *Kirkland* v. *Department of Correctional Services,* 520 F.2d 420 (2d Cir. 1975), a class of minority applicants

for promotion to a position within the New York State Department of Correctional Services, filed a civil rights complaint under 42 U.S.C. 1981 and 1983 challenging, *inter alia,* a State Civil Service examination which the State used to determine the successful applicants for the job. The Second Circuit agreed with the District Court that the examination was not job related and had a discriminatory impact on minorities, but reversed the District Court's order requiring that any new test for the position in question be furnished by the State to the minority applicants for their prior review. The Court held:

> "The District Court ordered that the new test prepared by defendants be submitted to the plaintiffs for review. We find this requirement difficult to comprehend. Presumably, this examination will be taken by members of the plaintiff class in competition with others. Permitting advance review by plaintiffs would place all others at a competitive disadvantage. If the District Judge is seeking professional assistance from plaintiffs' expert, his order should so provide; and proper steps should be taken to insure confidentiality" 520 F.2d at 427.

From the foregoing, therefore, it is evident that disclosure of the actual tests and the test scores of individuals taking the tests to unions and employees represented by unions, who have no professional obligation not to publicize the tests and test scores, will invalidate the tests both as a practical matter and under Title VII of the Civil Rights Act. Invalidation of testing as an employee selection device, both in private industry and government, may well lead to unqualified persons being placed on jobs of critical importance, such as the job in question in the present case, to the detriment of the employees, employer and the public at large.

The Company involved in this case is a large public utility—a classic example of a "business affected with a public interest" (*Munn* v. *Illinois*, 94 U.S. 113 (1877)). As such it has a duty to its consumers and the public to take all reasonable precautions to determine that only qualified personnel perform important jobs such as the job involved in this case. Validated, job related testing is a business necessity essential to carry out the Company's duty to place only qualified employees on admittedly "critical" jobs such as the job involved here.

The uncontradicted record in this case shows that the Company spent "tens of thousands of dollars" (A. 128) in validating the instrument man battery of tests to the exacting requirements of the EEOC Guidelines and the APA Standards.[11] In addition, the Company's own validation study was corroborated by a later validation study by an outside consultant, the National Compliance Company. The result of these considerable and expensive efforts was upheld in the arbitration award in which the distinguished and experienced labor-management Impartial Arbitrator Dallas Jones found that the Company had a contractual right to use tests as a selection device for the Instrument Man job and that the tests used had a high degree of validity (P.A. 72-73a).

In short, the test battery involved in this case scrupulously adheres to the Court's seminal observation in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436

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[11] See pp. 8-12 of this brief for a detailed description of how the Company determined the criterion-related validity of the Instrument Man test battery.

(1971), "that any tests used must measure the person for the job and not the person in the abstract".

If, therefore, the extreme and novel judicial construction of Section 8(a)(5) of the National Labor Relations Act by the Court below is not reversed, this Company's substantial and successful efforts to validate its Instrument Man test battery under the EEOC Guidelines and APA Standards, as approved by this Court, will have been completely undermined. It is apparent that any such rule would not be limited to the Detroit Edison Company, but would adversely affect all testing programs administered by private and public employers.

In the over forty years of enforcement of the National Labor Relations Act, this is the first case in which the Board has construed Section 8(a)(5) of the Act to impose a requirement on employers to disclose to unions job related aptitude tests and test sheets and scores by named applicants. Indeed, in the only previous reported case, the Board's General Counsel had the common sense to refuse even to issue a complaint on a union charge seeking production of actual tests under Section 8(a)(5) of the Act. *International Telephone & Telegraph, Federal Division,* Case No. SR 657, 46 LRRM 1387 (1960). In this case the Board's General Counsel agreed with the Company's contention that the specific items on the tests had a "unique character" and that:

> "[W]hile it [the Company] would bargain concerning the general subject of the tests, it would not furnish specific test questions, since advance inspection thereof would permit their content to be widely disseminated and thus impair the usefulness of the test."

Thus, well before the passage of the Civil Rights Act of 1964 and the EEOC Guidelines on testing, the Board's General Counsel understood that tests had a unique character and that their disclosure to a union would permit them to be widely disseminated and impair their usefulness.

2. The Inefficacy of the "Restriction" Approved by the Court of Appeals in Preventing the Dissemination of the Test Materials to Unauthorized Persons

The Board's opposition to the petition for certiorari does not appear to challenge the proposition that tests and test sheets and scores that are divulged to unauthorized parties result in invalidation of the tests. Rather, the Board claims that the "restriction" invented by the Board and approved by a majority of the Court of Appeals will prevent unauthorized disclosure of the tests [12] to those who have taken the test in the past or who may take it in the future. This was the view that dissenting Judge Weick termed "really naive" (P.A. 11a).

The reasons why this view is naive are the following:

1. A violation of the copying and dissemination provisions in the Board opinion (no protective provision appears in the Board's Order) would be most difficult, if not impossible, for a company to enforce and police once it has given a union the test materials as required by the Board order. At that point it has lost

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[12] It is to be noted that the "restriction" is applicable only to the test battery and not to the test scores. Under the Board order as enforced by the Court of Appeals, the Union could publish the scores achieved by the examinees and distribute them generally.

control over the materials, and "test security" in accordance with Standard I5 of the APA Standards quoted above and the EEOC Guidelines incorporating those standards has been breached.

2. There is a built-in ambiguity with respect to exactly what specific individuals comprise "the Union" to which the Board and Court have ordered the Company to divulge the tests and test scores. Is "the Union" the individuals who comprise the executive officers of the Union, its Executive Board, its grievance committee, or is it the entire membership of this presumably unincorporated association? Obviously arguments could be made for any one or a combination of the above alternatives. Even if it were confined to the executive officers, Executive Board or grievance committee of the Union, these individuals are also members of the bargaining unit and change on a regular basis as the result of internal Union elections. The knowledge thus gained by these individuals pursuant to the Court enforced Board Order could be used by them to gain an unfair competitive edge on others not privy to the test or test scores, and thus invalidate the test, even though the Union officials themselves had not copied or otherwise disseminated the test.

3. As organizations properly responsive to their members' desires and free from professional restrictions against disclosure, unions are in a uniquely poor position to prevent intentional or inadvertent dissemination of test materials, particularly in view of the ubiquitous copying machine. Inadvertent disclosure by non-psychologists can be illustrated by the case of *Davis* v. *Washington,* 348 F.Supp. 15 (D.C. 1972), where Judge Gesell entered an order sealing the Civil Service examination in question "because it is given

on a regular basis to many federal job applicants", only to have the dissenting judge on the Court of Appeals append the entire examination to his public opinion. See *Davis* v. *Washington,* 512 F.2d 956, 967 D.C.Cir. 1975), reversed, *Washington* v. *Davis,* 426 U.S. 229 (1976). The record in this case provides an excellent example of how disclosure of the test items to employees could occur without an express violation of the "restriction". When the Union representative was given *sample* items of each of the tests involved in the arbitration proceeding, he read into the record the actual sample test item and asked the Company psychologist and employee witnesses how those questions were relevant to the Instrument Man job (See, e.g., A. 261, 286-289, 293, 328-330). Presumably, if the Union were given the *actual* test items the Union representative would in like manner read the actual test items or some of them into the record for an employee response concerning relevance. Since the arbitration record is transcribed, and since all Union members presumably have access to such transcripts, disclosure of actual test questions may well occur in this manner even though the "restriction" may not have been literally breached.

4. This record clearly shows a hostility to the entire concept of testing as an employee selection device by this Union and a preference for promotion by seniority alone (A. 160-169), despite the contractual agreement of the parties to promote on the basis of seniority only where there is no "head and shoulders" difference in the qualifications and abilities of the applicants. Thus, disclosure of the test materials to the Union is not a disclosure to an impartial body with no motive to discredit testing as a selection device, but

rather is a disclosure to an avowed enemy of the concept of testing. It requries a complete suspension of ordinary common sense to assume that furnishing a Union, which is hostile to testing, the ammunition to destroy test validity will not result directly or indirectly, inadvertently or intentionally in the Union's use of the ammunition.

5. Even if the Union were found to violate the "restriction" contained in the Board's opinion, the Company remedy is speculative at best. In the first place, only the Board's General Counsel can initiate contempt proceedings, and the initiation of such proceedings is solely within his discretion. The Company has no independent right to initiate such proceedings. *Amalgamated Utility Workers* v. *Consolidated Edison Company,* 309 U.S. 261, 264 (1940). It is also difficult to conceive of a contempt proceeding being brought in the Court of Appeals against a union that (1) has not been found guilty of an unfair labor practice, and (2) was not a party to the proceedings in the Court of Appeals. Finally, it would appear that inadvertent disclosure would be completely beyond the contempt powers of the courts.

6. Even if the Union were liable in contempt for a violation of the "restriction", there is no adequate remedy for the violation, since the tests will have been hopelessly invalidated and it would take years to validate a new test.[13] The only sanction against the Union would be punitive, not remedial—a very small source of comfort to a company whose testing program has been gutted, and of absolutely no comfort

[13] The evidence in this case showed that it took seven years to validate the power plant operator test battery (A. 309-310).

to the public whose interests could well be jeopardized by the presence of unqualified persons on jobs of critical importance in the generation of electrical power."[14]

II

Disclosure Of The Test Materials To The Union Has No Probable Relevance Or Usefulness To The Union In Carrying Out Its Statutory Duties And Responsibilities In Processing The Promotion Grievances Through Arbitration

As noted at the outset of the first argument, made above, the Board had a preliminary burden of proving by substantial evidence on the record considered as a whole that disclosure of the tests and test scores linked to the name of the applicant was of probable relevance and usefulness to the Union in carrying out its statutory duties and responsibilities. This "discovery-type" standard was approved by this Court in *NLRB* v. *Acme Industrial Company,* 385 U.S. 432 (1967), where the Court found that the Company violated Section 8(a)(5) of the Act by refusing to disclose to the Union information concerning removal of machinery from the plant that had been the subject of a Union grievance and proposed arbitration proceeding.

Even applying the broad standard of *Acme* to the "unique" information sought in the present case, there was no showing of probable relevance or usefulness to the Union in obtaining the tests and test scores linked to the names of the applicants.

[14] For many of the foregoing reasons a commentator on this case concluded that the "restriction" imposed by the Board and accepted by the Court of Appeals would be ineffective in preventing dissemination of the tests. *Psychological Aptitude Tests and the Duty to Supply Information,* 91 Harvard Law Review 869, 875-876 (1978).

Any analysis of this subject must begin with the series of substantial Company efforts to be completely responsive to the Union's test information requests in a mutually satisfactory form without invalidating the testing program itself. These efforts included furnishing the Union with (1) the two validation studies done on the test battery, (2) written explanations of the tests and scoring weights of the tests, (3) some 146 samples of the types of questions found in the MPFB and each of the six subparts of the EPSAT, (4) the test scores of all the examinees without linking the examinees' name to the scores, and offering to the Union (1) to release the score of any named examinee who consented to such release, (2) to let the Union's representative take the test, and (3) to turn over the test battery to a qualified industrial psychologist of the Union's choice.

In short, the Company gave or offered to give the Union all the information it possessed concerning its instrument man test battery except for the actual tests and test sheets and scores linked with the names of the applicants. This is what dissenting Judge Weick found was the "wealth of information" on testing which he found "was, in my judgment, sufficient to permit the Union to process adequately the grievance pending before the Arbitrator, or to perform its duties under the collective bargaining agreement" (P.A. 11a).

1. The Irrelevance of the Tests

The three professional industrial psychologists who testified in either the arbitration case or Labor Board hearing each testified without contradiction that disclosure of the actual tests to the Union directly would not be helpful in determining the validity of the test

battery, and that the validity of the test battery could best be determined by disclosure of the validation studies performed in 1970 and 1972, which were provided to the Union (A. 50-51, 71-72, 79-80, 191). No expert witness for the Union or the Board's General Counsel ever disputed this fact.

The Impartial Arbitrator came to the same conclusion, holding that production of the actual test battery to the Union would "prove nothing", and that the Union's position in the arbitration case was not "damaged in any way by lack of access to the test" (P.A. 72a). Even the NCC, which revalidated the test in 1972 did not need or utilize the actual test battery in its validation study (A. 100).

The irrelevance of the actual tests themselves to the Union's statutory responsibility in processing the promotion grievances through arbitration is further underlined by what the Union did when it was furnished sample questions of each of the tests involved. The only use made of the sample items—and presumably the only use to be made of the actual test items—was to pose the samples to the Company's industrial psychologist, to incumbent Instrument Men and applicants for that job and ask them whether the sample items were "connected with or relevant to the instrument man job" (See, e.g., A. 261, 286-289, 293, 328-330). That series of questions and answers, however, is irrelevant since it is admitted, as found by the Administrative Law Judge, that:

> "These tests are not designed to test the skills or knowledge of the applicant which may be related to the job, but the capacity or aptitude of the employee to be trained and to do the job efficiently" (P.A. 22a).

Thus, for example, it is evident that a Company Instrument Man may not need as a part of his substantive knowledge in performing the Instrument Man job to know which way an airplane will turn if one of its two engines is out (see sample 9 on the Mechanical Comprehension subpart of EPSAT, A. 393). A layperson might well conclude that the answer to that question was not "connected or relevant to" the instrument man job since Instrument Men do not work on airplanes. Since, however, the test is not designed to measure job knowledge, but rather to determine aptitude to perform the job, there is no necessary direct relationship of each test item with the day-to-day work of the Instrument Man. Thus, disclosure of the test items to the Union to obtain lay opinions about the relevancy of the specific test items to the Instrument Man job when no such direct relevance necessarily exists is neither relevant nor useful to the Union in the exercise of its statutory rights.

Despite the foregoing, the Administrative Law Judge, with the Board's approval, held that while production of the actual tests might not be necessary to determine the test's validity in predicting employee success on the job, it might be necessary for the following reasons:

> "To inform the employees, or their representatives, whether the tests are truly job related or contain objectionable distortions . . . whether they have built-in bias and are, in fact, discriminatory, or whether, in sum, they tend to undercut Respondent's contract commitment to promote by seniority where there is no 'significant difference' between the 'reasonable qualifications and abilities' of the applicants for promotion" (P.A. 47a).

But the conjecture of the Administrative Law Judge that the battery may contain "distortions", "built-in bias" and be "discriminatory"—whatever those generalizations mean—is at war with the uncontradicted record that there is a demonstrated high correlation between the good performers on the tests and good performers on the job and the decision of the Arbitrator that the test battery was a "reliable valid test" which had a "high degree of validity". If the tests had "distortions", "built-in bias" or were "discriminatory", that obviously could not be the case.

If the problem posed by the Administrative Law Judge is one of advising the employees or their representative of the *nature* of the items on the Instrument Man test battery so that they might better know the "criteria required for promotion" (P.A. 48a), the Company has already done this by explaining to the Union in some detail the nature of both the MPFB and the six-part EPSAT, together with the furnishing of 146 sample questions closely corresponding to the kind of actual questions on each portion of both tests.

The Court of Appeals simply brushed off the Company's relevance argument in the following manner:

> "*Without actually contesting the finding that the tests, answer sheets and scores are relevant,* Detroit Edison argues, in effect, that the circumstances of this case are such as to require that the tests and answer sheets be delivered only to a qualified pychologist" (P.A. 5a) (Emphasis added).

The italicized portion of the above quote is simply erroneous factually. In its brief to the Court of Appeals, as well as in its petition for rehearing *en banc,* the Company argued strenuously under separate head-

ings that the tests and test scores linked with the name of the applicants were irrelevant (Co.Br. to Sixth Circuit Court of Appeals, pp. 26-33).

The Board seeks to avoid the relevance argument on its merits by claiming that the Company's failure to file an exception to the decision of the Administrative Law Judge ordering the Company to disclose the tests to a qualified psychologist of the Union's choice constituted an admission by the Company of the probable relevance and usefulness of the information to the Union.

This stilted reasoning overlooks the fact that the decision of the Administrative Law Judge on the issue of the tests (as opposed to the test scores) was no more than what counsel for the Company offered to do at the outset of the hearing as yet another compromise expressly "to appease" the Union. There was, therefore, no practical reason for the Company to file an exception to the order to disclose the tests to a professional psychologist. The Board has now seized on the last of a series of compromises offered by the Company simply "to appease" the Union, which was accepted by the Administrative Law Judge without Company exeeption, as an admission by the Company of relevance. Worse still, the Board now argues that when it upset that compromise and ordered the Company to disclose the tests to the Union directly, it thereby finessed the Company's further right to argue relevance to the courts. The absurd result of the Board's reasoning is that either the Company should not have offered the compromise or it should have filed an exception to this aspect of the decision which was deemed favorable to its interests on the possibility that the Board might

upset the compromise and order disclosure of the tests to the Union directly.

2. The Irrelevance of the Test Scores Linked with the Names of the Applicants

It will be recalled that during the arbitration proceeding the Company furnished the Union with the raw test scores achieved by each applicant who took the tests, but did so without linking the name of the applicant with his score.[15] The Company did this because it agreed with the Union that the scores themselves might be relevant. If, for example, twenty persons took a test with a 10.3 cutoff score, it might be relevant for the Union to know if a large majority of the twenty were clustered just above or just below the 10.3 score (thereby permitting an argument that there was very little difference in the applicants). Other arguments based on the scoring spread could be made. What this record totally lacks, however, is any evidence supporting the relevance of linking the applicant's name with the score he achieved.

The only reference to the alleged relevance of the scores linked with the names of the applicants in the decision of the Administrative Law Judge was the following:

> "Contrary to Respondent's contention, the arbitrator, who passed on the merits of the grievances, stated, during the reopened hearing, after his initial decision, that, in his opinion, the Union could not adequately 'police' the contract without the

[15] In addition, the Company offered to release the test scores of any employee who indicated his willingness to have his test score divulged.

> information. The arbitrator, in fact, directed Respondent to reconsider its selection process, in part, based upon the scores achieved by the applicants'' (P.A. 49a).

The Board accepted this finding without comment, even though the Company filed a specific exception to the relevance finding, and, as noted above, the Court of Appeals erroneously found that the Company did not "actually" contest the relevance finding on the test scores (P.A. 5a).

The reference in the Administrative Law Judge's opinion to the Arbitrator's statement in the reopened arbitration proceeding is highly misleading. The statement referred to was not a ruling, but rather the beginning of a colloquy between counsel and the Arbitrator directed toward ascertaining whether the Company had properly implemented the original award directing that those scoring between 9.3 and 10.3 be re-examined. The Arbitrator was inquiring how those individuals could be re-examined if their scores were not divulged. Counsel for the Company agreed that the names of the three individuals who scored between 9.3 and 10.3 should be disclosed, and stated that he proposed to call the responsible Company witnesses who would testify concerning the three named individuals who scored between 9.3 and 10.3. He then stated that he believed that this was "sufficient proof" (A. 338). The Arbitrator responded:

> "I think I would agree with that, Mr. Houghton. If we could have the Detroit Edison employee who is responsible for that activity testify that these names do go with these scores, then I will have to accept that as reliable evidence" (A. 338)

The names of the individuals scoring between 9.3 and 10.3 were then disclosed (A. 341-342). In his supplemental decision, the Arbitrator did not rule that the Union was entitled to the test scores of all named applicants. He ruled that:

> "The Company, for the purpose of the instant hearing, did disclose the names of those individuals at the Monroe Power Plant who scored between 9.3 and 10.3. The actual score received by each individual was not disclosed; however, this is not of such importance as to preclude a review of the Company's action in implementing the Award. Regardless of the score an individual attained in the range between 9.3 and 10.3, it is, under the terms of the Award, his qualifications *other than test score* which became of decisional importance" (P.A. 81a) (emphasis added).

It is, therefore, plainly erroneous to state that the Arbitrator held that all scores linked with the names of all the applicants had to be disclosed to the Union. All he held was that the Union was entitled to know the names of the applicants scoring between 9.3 and 10.3, and the Company complied with this holding.[16]

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[16] The Board is mysteriously selective in its reliance on the Arbitrator's opinion and award. The Arbitrator's written holding that providing the Union with the test battery would "prove nothing" and that the Union's position in the case was not damaged in any way by lack of access to the tests is simply ignored, while controlling weight is given to some ambiguous remarks made on test scores at the beginning of a colloquy which ultimately resulted in the Arbitrator's concurrence that the Company had discharged its obligations on disclosing test scores linked with the names of the applicants by having its industrial psychologist testify to the names of the three individuals who scored between 9.3 and 10.3 on the test battery.

The irony of the Board's misplaced reliance on remarks made by the Arbitrator in colloquy with counsel is that if he really meant that the scores achieved by each named applicant be disclosed to the Union, it would tend to undercut one of the main reasons he used in finding that the tests were proper. Thus, he ruled that:

> "In addition, and very important, the instant test is not used to compare one employee against another in terms of scores attained . . . This problem is eliminated by reporting scores in terms of 'not recommended' and 'accepted' " (P.A. 73a).

The record is thus bereft of any evidence supporting the relevance of disclosing test scores linked with names of the applicants to the Union.

The Company nevertheless submitted evidence why the test scores achieved by named individuals should not be disclosed to the Union. In addition to the breach of APA Standards and the consequent invalidation of the tests under the EEOC Guidelines by disclosure of test sheets and scores of named applicants discussed in Part I of the Argument, the record in this case showed that the Company gave a specific oral promise of confidentiality to all applicants prior to testing. That promise was that:

> "Your test scores are confidential. We will tell the Employment Department generally how you did on these tests and they may talk to Company departments about your being put in a certain job, but your test scores are kept only in our files" (A. 445).

This principle of confidentiality is not—as intimated by the Board—a device to foil the Union in its attempt

to process employee grievances. Rather, it is an emerging and far-reaching principle now firmly implanted in the federal law that there is a right of privacy for those taking psychological aptitude tests. Thus, for example, for students in federally assisted educational institutions there is an express statutory prohibition against the release of education records of such students without consent. 20 U.S.C. § 1232(g).[17] While it is true that employees of the Company are not students in federally assisted educational programs, the point is that the Company's concern is not a parochial one, involving its defenses to Union grievances over promotions, but parallels a broad Congressional concern shown for the disclosure of the same type of test scores in a federally assisted educational context.

In addition, the Company provided evidence that disclosure of test scores linked with the names of the applicants in the past resulted in harassment of the lower scoring employees who were called "stupid", "dummy" and the like, and who actually left the Company because of such harassment (A. 84).

This evidence was brushed aside by the Board and Court of Appeals. Both held that the decision in the Court of Appeals in *General Electric Co.* v. *NLRB,* 466 F.2d 1177 (6th Cir. 1972), was controlling (P.A. 7a, 53a). In the *General Electric* case, the Company declined to provide the Union with information obtained in a survey of wages paid by various companies in the survey. The results of the survey were used to

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[17] See also 5 U.S.C. § 552(b)(6), where an exemption from disclosure was created by Congress in the Freedom of Information Act for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy".

determine the rates of pay of the General Electric employees. The Company argued that it should not be required to disclose the wage data obtained by named companies in the survey because it had obtained the information from these companies on a confidential basis. The Sixth Circuit ruled that:

> "Employers cannot be allowed to collect wage information on a pledge of confidentiality to parties outside the bargaining unit under these circumstances, then turn around and deny the Union the use of that data based on its voluntary pledge" 466 F.2d at 1185.

The harm of disclosure of wage information gained on a confidential basis from employers outside the bargaining unit cannot be equated with the harm of disclosure of test scores of employees within the unit, which were gained on a confidential basis.

The Administrative Law Judge, with the Board's approval, appeared to recognize that there might be a harm or, as he termed it, "odium" in test score disclosure, but claimed that such an odium is inherent in all testing programs (P.A. 53a). That observation simply misses the point. There is no particular odium involved in generally failing to achieve a 10.3 cutoff score. That only means that the applicant scored from 0 to 10.2. But if scores linked with the names of applicants are disclosed, and a particular applicant has scored particularly poorly in relation to the other applicants, a totally unnecessary "odium" is attached to that applicant, and the record disclosed past incidents of harassment of such individuals.

* * * * *

There is a clear relationship between the two arguments made in this brief. This Court in *NLRB* v.

Truitt Mfg. Co., 351 U.S. 149 (1956), in assessing a company refusal to provide a union with information relating to the financial condition of the company in the face of a company claim of inability to afford union economic demands, held that:

> "Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met" 351 U.S. at 153-154.

The Sixth Circuit Court of Appeals itself in *Kroger Co.* v. *NLRB*, 399 F.2d 455 (6th Cir. 1968), emphasized that a union's right to information under Section 8(a)(5) of the Act is not a *per se* or absolute right, but rather that it may involve a balancing of interests.

> "To us the critical problem appears to be how to recognize and how to adequately protect each of the conflicting interests that are involved here" 399 F.2d at 457.

Any such balancing of interests or examination of the circumstances of the particular case here must involve a determination of (1) the probable relevance and usefulness to the Union of the testing information involved—or the degree of such probable relevance and usefulness—in the light of the wealth of information on testing already disclosed by the Company to the Union, and (2) the invalidation or potential for invalidation of the Company's testing program under the APA Standards and EEOC Guidelines by disclosure of the test materials to the Union.

The less relevant and useful the requested information is to the Union in fulfilling its statutory requirements, as shown in Part II of this Argument, the more

the Company is entitled to protection against dissemination of the tests and test scores to prevent test invalidation, as shown in Part I of this Argument. Likewise, the less relevant and useful the test materials are to the Union, the less need there is for the Board and Court of Appeals to construct and seek to enforce a "restriction" of highly dubious efficacy.

In addition, any such balancing must take into account the strong federal labor policy favoring collective bargaining and arbitration as the preferred means of settling labor disputes arising under a collective bargaining agreement, as enunciated by this Court in *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). That policy has been completely ignored by the Board and the Court of Appeals in this case. The Arbitrator expressly found that the Union's lack of access to the actual tests did not damage its position in arbitration in any way and that disclosure of the tests to the Union would prove nothing. Contrary to the finality of arbitration awards endorsed by this Court in the *Steelworkers Trilogy*, the Board and Court of Appeals have simply brushed aside the conclusion of the Arbitrator on the irrelevance of the tests. Far from serving the complementary role to arbitration envisaged by this Court in *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967), the Board's processes in this case have been used to undermine the Arbitrator's role and decision. The decision also serves to undermine the collective bargaining process itself. The Union sought to obtain the tests and test scores in the 1972 negotiations. The Company successfully resisted these demands, only to have them now imposed by the Labor Board.

Finally, in any balancing of the interests involved, this Court has had previous occasion to remind the Labor Board that it "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may ignore other and equally important Congressional objectives", and that it must accommodate the statutory scheme of the National Labor Relations Act to other statutory schemes. *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47 (1942). See also *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 66 (1975). Here the Board, with the approval of the Court of Appeals, has sought to enforce the duty-to-furnish-information requirement of Section 8(a)(5) of the Act so single-mindedly—even though the information is of no relevance or barely marginal relevance—that it has totally failed to accommodate the equally important Congressional objective of insuring that tests used in employment selection decisions be valid and job related.

CONCLUSION

For the above reasons the Company respectfully requests that the Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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OCTOBER TERM, 1978

DETROIT EDISON COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-968

DETROIT EDISON COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 560 F. 2d 722. The decision and order of the National Labor Relations Board (Pet. App. 14a-59a) are reported at 218 NLRB 1024.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1977, and petitions for rehearing and rehearing *en banc* were denied on November 22, 1977 (Pet. 2; Pet. App. 13a). The petition for a writ of certiorari was filed on January 4, 1978, and was

granted on March 27, 1978 (A. 450).[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board reasonably exercised its remedial authority in ordering the employer to furnish to the union representing its employees copies of tests used by the employer in the selection of applicants for jobs and the employees' test papers and scores, where such information is relevant to the processing of employee grievances and the Board's order includes protective provisions to maintain test security.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 8. (a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> Sec. 10.
>
> * * * * *

[1] "A." refers to the separate appendix to the briefs.

> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in * * * any such unfair labor practice, then the Board * * * shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

STATEMENT

1. Since April 1971, petitioner Company has been party to collective bargaining agreements with Local 223 of the Utility Workers Union of America, AFL-CIO (the Union), covering the operating and maintenance employees in the production department of the Company's Monroe power plant (Pet. App. 19a-20a). The agreement in effect during the period relevant to this case included the following provision:

> Section 13. *Promotions.* In promotion of employees covered by this Agreement to classifications within the same bargaining unit, seniority will govern whenever reasonable qualifications and abilities of the employees being considered are not significantly different. "Significant difference" shall be "head and shoulders difference," and such factors as advance licenses or step-up experience shall not of themselves amount to significant differences. * * * [A. 116.][2]

[2] See also Section 38 (A. 117-118).

In late 1971, the Company began the process of filling six bargaining unit positions known as "Instrument Man B" jobs.[3] The posted requirements for these jobs were: satisfactory high school credits for two years of math and one year of science, a satisfactory physical examination, a minimum of "recommended" on the instrument man aptitude tests selected by the Company,[4] and a satisfactory attendance

[3] An instrument man "installs, maintains, repairs, calibrates, tests and adjusts precision instruments in the power plants" (A. 358).

[4] In 1958, the Company's industrial psychologists, after studying the Instrument Man job, hypothesized that certain cognitive abilities were required for the job and selected three tests which they felt would measure those abilities. The tests selected were: (1) the Wonderlic Personnel Test, which measures "general mental ability"; (2) six ability tests for "high school students entering engineering training" from Part IV of the Engineering and Physical Sciences Aptitude Test (EPSAT); and (3) the Minnesota Paper Form Board (MPFB) test, which measures the ability to visualize "how part of a diagram would fit together to make a complete diagram." (A. 188-189, 368.) Incumbent instrument men were given the tests (collectively called a "test battery") on an experimental basis, and were independently ranked by their supervisors in terms of their ability to do the various job functions of the instrument man job. A positive correlation between demonstrated ability to perform the instrument man job and higher scores on the test battery was shown to exist. (A. 190.)

In 1970, due to complaints from engineers in the plant that "some of the men that had met the 'acceptable' standard on the original instrument man battery were not working out very well on the job" (A. 232), the Company's psychologists restudied the test battery and decided to eliminate the Wonderlic test because "it was found that this test was adding to the predictive value of the battery only at the low end of

record (Pet. App. 20a). Ten Monroe unit employees bid for the instrument man jobs, but all were rejected for failure to achieve the minimum score of 10.3 set by the Company (Pet. App. 20a-21a).[5] The jobs were then filled by applicants from outside the Monroe unit (Pet. App. 21a).

In January 1972, the Union filed a grievance under the collective bargaining agreement, protesting

scores" (A. 347). The correlation coefficient between the remaining tests and supervisory ratings was determined to be .71 (as compared with .73, using the three tests) (*ibid.*). (If the relationship between two variables were positive and perfect, the correlation coefficient would be 1.0—that is, the same line would express the increases and decreases in both variables. On the other hand, a correlation coefficient of .0 would mean that no linear relationship exists. (A. 236-238.)

About a year later, the Company commissioned the National Compliance Company (NCC) "to inquire into the validity of the Instrument Man battery * * *" (A. 238, 354, 358). Using a sample of 35 incumbent instrument men who had taken the tests (the former three-test battery) and for whom supervisory ratings had been secured, NCC arrived at a correlation coefficient of .338 between the test scores and the Company's 1970 supervisory ratings (A. 364, 366). Despite the fact that the .338 correlation coefficient was substantially lower than that obtained in the 1970 study, the NCC concluded that it was still statistically significant, *i.e.*, the "test battery appears to be effectively selecting men who will perform better as Instrument Men" (A. 367).

[5] The actual test scores on the MPFB could range from 0 to 64, while the weighted scores could range from 2.61 to 6.62; the actual EPSAT scores could range from 0 to 155, while the weighted scores could range from 1.43 to 8.65. The battery score was obtained by adding the weighted scores on the two tests. The Company determined that a battery score of at least 10.3 was necessary to receive further consideration for the instrument man position. (A. 129-131.)

the rejection of the Monroe unit applicants on the ground that the testing procedure was unfair (Pet. App. 21a; A. 120). The grievance was rejected by the Company at all levels, and the Union took it to arbitration (Pet. App. 21a).

In preparation for the arbitration proceeding, the Union requested the Company to supply it with copies of the test battery, the applicants' test papers, and their scores. The Company refused, although it did furnish the Union with copies of reports validating the tests; sample test questions similar, but not identical, to those in the actual test battery; and the actual scores without identification of the employees (Pet. App. 30a-31a, 66a). The Union asked the arbitrator to order production of the requested materials, but he declined on the ground that he did not believe he had the authority to do so (Pet. App. 31a-32a, 34a). The parties agreed to proceed with the arbitration without the requested materials, subject to the right of the Union to reopen the case if the Company were subsequently ordered by a court to provide them (Pet. App. 67a-68a). In December 1973, the arbitrator issued his decision, finding that the test battery was properly validated (Pet. App. 73a), but that the 10.3 cut-off score was too high in that it eliminated from consideration applicants whose test scores were not so far below the cutoff score as to make it improbable that they would succeed in the job (Pet. App. 74a-75a). Accordingly, he ordered the Company to reconsider three of the rejected Monroe

unit applicants who had scored between 9.3 and 10.3 on the test battery (Pet. App. 75a).[6]

2. Upon a charge filed by the Union, a complaint was issued against the Company, alleging that it had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to provide the requested information (Pet. App. 18a-19a). Following a hearing, the Board's Administrative Law Judge sustained the allegations of the complaint, finding that the Company had failed and refused "to honor the Union's demand for certain information relevant and reasonably necessary to the processing of employee grievances" (Pet. App. 55a). He recommended that the Company be ordered (Pet. App. 55a-56a):

> to supply copies of the battery of tests administered to the employee applicants for the position of Instrument Man B in this proceeding, including the actual test papers of the applicants (necessary to check the accuracy of the scoring of the tests), only to a qualified psychologist selected by the Union to act in its behalf * * *. The psychologist shall be free to fully advise the Union concerning these tests, so that the Union may fully protect the rights of the employees in the appropriate unit; the Union shall have the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances, but not to copy the tests, or other-

[6] Subsequently, one of the three was promoted to an instrument man job (Pet. App. 39a).

> wise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests. After the conclusion of the arbitration proceeding, or if no request is made to reopen the arbitration hearing within 90 days after the psychologist receives the battery of tests, all copies of the battery of tests shall be returned to [the Company].[7]

The administrative judge also recommended that the test scores of each applicant, linked to the applicant's name, be provided directly to the Union (Pet. App. 56a).[8]

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[7] The administrative judge stated that he was recommending that the materials be supplied not directly to the Union, but to a psychologist hired by it, because:

> mere disclosure of the tests to lay Union representatives is not likely to be productive of constructive results. If the tests are to be properly analyzed, this should be done by those who have the expertise to deal with the concept involved. * * * [I]n some cases, as this, the technology of the efficiency experts may outrun the ability of the individual to cope. The individual then needs an expert of his own. However, this does not affect the right of the employee, through his representative, to be informed, but may determine the manner or form [in] which the information is submitted. [Pet. App. 54a.]

[8] The administrative judge found that the Company "has produced no probative evidence that the employees' sensitivities are likely to be abused by disclosure of the scores" (Pet. App. 53a). Moreover, the administrative judge found that, to require the Union to secure the consent of the individuals concerned, as the Company contended, would impair the

The Company excepted to the latter recommendation, but not to the former. It specifically requested the Board "to adopt that part of the order which requires that tests be turned over to a qualified psychologist selected by the Union," including the provision that such submission be done in accord with the limitations spelled out by the Judge. (Pet. App. 2a.)

The Board adopted the administrative judge's findings and recommendations, except that it "would not condition the Union's access to the information on the retention of a psychologist but rather would have [the Company] submit the information directly to the Union and let the Union decide whether the assistance or expertise of a psychologist is required" (Pet. App. 15a).[10] The Board recognized the interest in maintaining security of the tests and therefore, "in order to preserve their future utility," imposed "the same restrictions upon their use by the Union as recommended by the Administrative Law Judge" (Pet. App. 16a).

"Union's obligation * * * to represent the unit of employees as a whole," by securing "information relevant and reasonably necessary to the enforcement of the collective-bargaining agreement which exists for the benefit of all" (Pet. App. 56a).

[9] The exceptions are not printed in the Appendix. We have therefore lodged with the Clerk a copy of the Union's exceptions, the Company's exceptions, and an "Answering Brief" filed by the Company in response to the Union's exceptions.

[10] Member Kennedy would have adopted the administrative judge's recommended order (Pet. App. 17a).

3. A divided court of appeals [11] enforced the Board's order, noting that the Company "did not except to the [Administrative Law Judge's] finding that it had engaged in an unfair labor practice by refusing the union's request for the test materials" (Pet. App. 2a), and did not contest "the finding that the tests, answer sheets and scores are relevant" (Pet. App. 5a). The court rejected the Company's contention that the Board erred in ordering that the battery of tests be provided directly to the Union, concluding that the "answer to [the Company's] concern about the possibility of the tests falling into unauthorized hands is found in the Board's adoption of the administrative law judge's limitations on use of the materials by the union. The restrictions on use of the materials and obligation to return them to [the Company] are part of the decision and order which we enforce. Violation of these provisions would be subject to the same sanctions as violation of any provision of a judicially enforced order of the Board." (Pet. App. 6a-7a.)

The court also rejected the Company's contention that it would be a breach of confidentiality to give the Union test scores linked to the names of employees taking the test because the "requirement that the bargaining representative be furnished with relevant in-

[11] Judge Weick dissented (Pet. App. 8a-12a) on the ground that turning over the test papers to the Union would destroy the future value of the tests, would breach the confidentiality privilege of the applicants, and would subject the psychologists who administered the tests to disciplinary action.

formation necessary to carry out its duties overcomes any claim of confidentiality in the absence of a showing of great likelihood of harm flowing from the disclosure" (Pet. App. 7a). Finally, the court rejected the Company's contention that direct disclosure of the test battery and the linked test scores "would involve [the Company's] industrial psychologists in a breach of their professional ethical code." The "professional code of the American Psychological Association can[not] stand as a barrier to the right of a duly chosen and certified collective bargaining representative to receive information of use to it in carrying out its duties and responsibilities. The Board showed its consideration for the expressed concerns of the company and the [American Psychological Association] by adopting the limitations on use of the material recommended by the administrative law judge." (Pet. App. 8a.)

SUMMARY OF ARGUMENT

I.

The Administrative Law Judge, whose findings were adopted by the Board, found that the test battery, the test papers, and the test scores linked with employee names were relevant to the Union's processing of employee grievances respecting the instrument man job, and that the Company violated the duty to bargain imposed by the Act by denying the Union's request for such information. See *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432.

Insofar as the Company questions the relevancy of the test battery and the test papers, that challenge is foreclosed because of the Company's failure to file exceptions to the administrative judge's findings with the Board.

In any event, the Board properly concluded that the materials sought by the Union were relevant to the processing of the pending grievances. The Union was not attacking the validity of the tests, but was attempting to show that, even assuming there was a high statistical probability that those applicants who did well on the tests would do well in the instrument man job, certain applicants, though they did poorly on the tests, nonetheless had the ability to perform the job. Indeed, petitioner admits that there is a 20 percent probability that a low scorer on the test would still be qualified for the job.

The test battery and the test papers and scores would enable the Union to determine the extent to which questions were asked which called for knowledge beyond the requirements of the instrument man job, and whether particular applicants received low scores solely because they failed to answer such questions correctly. Finally, the Union needed to link the employees' names with their test scores, not only to verify the accuracy of the scores, but to determine whether a particular employee was entitled to be considered for the job despite a low score.

II.

The Board was not unreasonable in ordering that the test materials be given directly to the Union, rather than to a Union-hired psychologist, as the administrative judge had directed. Since the Union was not challenging the validity of the tests but merely attempting to show that they were "unfair" to particular applicants, the services of a professional psychologist were not necessarily required. To force the Union to incur this substantial added expense where it would not contribute to the intelligent processing of the grievance, could well deter the Union from processing some grievances which it believed to be meritorious.

The Board's order, as enforced by the court of appeals, does not ignore the Company's interest in maintaining test security. It directs the Union "not to copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions" to past and future test-takers "or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests"; and, at the conclusion of the arbitration proceeding, the Union is directed to return all materials to the Company (Pet. App. 55a-56a). The order is similar to the kinds of protective orders fashioned by courts in ordering disclosure of sensitive information under the federal discovery rules.

Petitioner's contention that disclosure of the test materials to the Union would destroy the future validity of the tests rests upon the assumption that the

Union is likely to violate the Board's order as enforced by the court. However, the Union cannot be presumed to be predisposed to act in an unlawful manner. *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667. Moreover, the Union has ample reasons, apart from legal sanctions, to maintain test security, since its primary concern is to effectively represent the employees; violation of test security would adversely affect its relationship with the Company and could damage its standing and credibility with the employees. While there is always a possibility that a protective order may be breached, the Board weighed that minimal risk against the employee interests served by direct disclosure to the Union and properly concluded that the latter were entitled to prevail.

Even though only the Board may institute contempt proceedings, there is no reason to believe that it would fail to do so if it learned that the Union had violated the restrictions imposed by the Board and the court. Besides the other reasons the Union has for not misusing the test materials, the prospect of the substantial fine which could be imposed as part of a remedy for contempt of the court's order would be likely to deter the Union from such misuse.

III.

There is no merit in petitioner's contention that it should not be required to disclose the scores made by specific applicants because it promised the applicants that the scores would be kept confidential. The Union cannot be deprived of information which is relevant

to the discharge of its responsibility to represent fairly all of the unit employees merely because the Company has unilaterally decided to assure employees that the information would be kept confidential. See *General Electric Co.* v. *National Labor Relations Board*, 466 F. 2d 1177, 1185 (C.A. 6). Nor can the Company condition the release of such information upon the Union's obtaining the consent of the employees involved. See *Boston Herald-Traveler Corp.*, 110 NLRB 2097, 2100, enforced, 223 F. 2d 58 (C.A. 1). The Company produced no probative evidence that disclosure of employee names and test scores would impose a "clear and present danger" of harassment and violence (*United Aircraft Corp.* v. *National Labor Relations Board*, 434 F. 2d 1198, 1207 (C.A. 2), certiorari denied, 401 U.S. 993); indeed, it did not even show that any employee test-taker objected to disclosure of his test score.

Contrary to the contention of the American Psychological Association, the psychologist-client counselling relationship is not jeopardized by disclosure of employee names and test scores, since the test-taking here involved no such relationship. It is not at all clear that the Board's order is inconsistent with any of the Association's Ethical Standards. But, in any event, the Board's order enforcing federal statutory rights would take precedence over the Ethical Standards and any state law incorporating them. See *National Society of Professional Engineers* v. *United States*, No. 76-1767, decided April 25, 1978; *Nash* v. *Florida Industrial Commission*, 389 U.S. 235.

ARGUMENT

THE BOARD REASONABLY EXERCISED ITS AUTHORITY TO REMEDY UNFAIR LABOR PRACTICES IN ORDERING THE COMPANY TO FURNISH DIRECTLY TO THE UNION THE TEST BATTERY AND ACTUAL TEST PAPERS AND SCORES OF EMPLOYEE JOB APPLICANTS IN CONNECTION WITH THE PROCESSING OF EMPLOYEE GRIEVANCES CONCERNING USE OF THE TEST

A. The test materials requested by the Union were relevant to the employee grievances

In *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, this Court held that it is a violation of the duty to bargain imposed by Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), for an employer to deny a bargaining representative information that is potentially relevant and useful to the representative in processing grievances under a contractually established grievance procedure. The duty to furnish such information was said to be governed by a "discovery-type standard" (385 U.S. at 437). Here, the administrative law judge, applying that standard, concluded that the information requested by the Union—the test battery and the actual test papers and scores of employee applicants for the instrument man jobs—was relevant. Petitioner now challenges that finding (Pet. Br. 43-54).

1. The short answer is that the argument comes too late. Before the Board, the Company did not except to the administrative judge's findings or recommendations with respect to the test battery and the test

papers of the applicants, but instead urged the Board to adopt that part of the order which required the tests to be turned over to a psychologist selected by the Union. It merely excepted to the administrative judge's recommendation that the scores of each applicant, linked to the applicant's name, be reported to the Union (*supra*, p. 9). In normal course, this would foreclose judicial review of the question of relevance.[12]

Petitioner seeks to avoid this consequence by arguing that it had "no practical reason" to challenge the administrative judge's order because it had earlier offered voluntarily to do most of what was ordered in an effort "to appease" the Union (Pet. Br. 48). We do not follow that argument. The Union filed exceptions to the recommended order insofar as it limited disclosure to a designated psychologist and the Company excepted to the order insofar as it required disclosure directly to the Union of test scores linked to the names of the applicants. Thus, petitioner was well aware that the administrative judge's decision as a whole was subject to re-examination by the Board. Unless it wished to adhere to its offer, the Company

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[12] Section 10(e) of the Act, 29 U.S.C. 160(e), states that where an objection "has not been urged before the Board * * *. [it] shall [not] be considered by the court." The Board's Rules and Regulations, 29 C.F.R. 102.46(b), provide that "any exception to a ruling, finding, conclusion, or recommendation [of the Administrative Law Judge] which is not specifically urged [before the Board] shall be deemed to have been waived." See *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322.

should have raised the relevancy issue. Having failed to do so, it could not challenge the matter for the first time in the court proceedings. Indeed, the court of appeals states (Pet. App. 5a) that petitioner did not "actually contest[] the finding that the tests, answer sheets and scores are relevant" even in that forum. The attempt to do so here is untimely.

2. In any event, the Board properly concluded that the materials sought by the Union were relevant to the processing of the pending grievances. This is clear when the nature of the inquiry is stated. The Union was not suggesting that it was improper to use tests. Nor was it challenging the general utility (or "validity") of the particular tests administered by the Company. Rather, the Union's position was that, assuming a high statistical probability that those applicants who did well on the tests would do well in the instrument man job, the tests were nonetheless "unfair" to certain applicants who, though they did poorly on the tests, had the ability to perform the job.[13]

[13] As the administrative judge noted (Pet. App. 47a):

> The statistics may, indeed, tend to show that the tests are valid to serve *the employer's purpose*: i.e., they may serve to identify those employees likely to do well on the job. However, the statistics do not serve to inform the employees, or their representative, whether the tests are truly job related or contain objectionable distortions (it is admitted that "valid" and "job related" are not co-extensive), whether they have built-in bias and are, in fact, discriminatory, or whether, in sum, they tend to undercut [the employer's] contract commitment to promote by seniority where there is no "significant difference" between the "reasonable qualifications and abilities" of the applicants for promotion. [Citation omitted.]

The arbitrator's holding that disclosure of the actual test battery to the Union would "prove nothing" and that the Union's position in the arbitration case was not "damaged in any way by lack of access to the test" (Pet. App. 72a) was premised on the erroneous view that the Union only wanted to prove the invalidity of the test battery. Moreover, while the arbitrator ruled that he had no authority to compel production of the material sought by the Union, he reserved the right of the Union to reopen the arbitration case if it obtained the materials through court order (Pet. App. 34a).

In sum, the Union was questioning whether the tests, in practice, screened out eligible applicants. At the end of the day, it might be found that, although generally accurate, the tests ought to be amended in certain particulars, or that certain failing applicants should be reconsidered by applying criteria additional to the tests. These, and perhaps other possibilities, were legitimate avenues for the Union to pursue. To be sure, the Company's interest is to decide as quickly and inexpensively as possible who should be promoted to more advanced positions, and to that end, to rely entirely on giving tests and abide by the results. On the other hand, the proper concern of the Union, as representative of the employees, is to insure that each employee will have every opportunity to advance as far as his unique capabilities justify, and that, when promotions are made, each employee who so desires will be given the chance to prove that he is capable of doing the more advanced job.

The fact that the test scores of employees on the job correlate with supervisory ratings of their job

performance (but see Pet. App. 23a; A. 232, 239-240) does not establish a casual relationship, and therefore does not end the inquiry.[14] An employee with a low score on the test will not necessarily be incapable of performing the job well. Indeed, petitioner acknowledges (Pet. Br. 11-12) that those scoring less than 10.3 on its test battery had a 20 percent chance of becoming successful instrument men. Moreover, the background or experience of certain applicants may be such that the test questions do not fairly measure their aptitude.[15]

[14] See Hoel, *Elementary Statistics* 192-193 (3d ed., 1971):

> The interpretation of a correlation coefficient as a measure of the strength of the linear relationship between two variables is a purely mathematical interpretation and is completely devoid of any cause and effect implications. The fact that two variables tend to increase or decrease together does not imply that one has any direct or indirect effect on the other. Both may be influenced by other variables in such a manner as to give rise to a strong mathematical relationship. For example, over a period of years the correlation coefficient between teachers' salaries and the consumption of liquor turned out to be .98. During this period of time there was a steady rise in wages and salaries of all types and a general upward trend of good times. Under such conditions, teachers' salaries would also increase. Moreover, the general upward trend in wages and buying power, together with the increase in population, would be reflected in increased total purchases of liquor. Thus the high correlation merely reflects the common effect of the upward trend on the two variables. Correlation coefficients must be handled with care if they are to be given sensible information concerning relationships between pairs of variables. Success with them requires familiarity with the field of application as well as with the mathematical properties.

The relevancy of the requested materials in exploring these matters is obvious. The test battery would enable the Union to determine the extent to which questions were asked which called for specialized knowledge beyond the requirements of the instrument man job, or which did not fairly measure the aptitude of certain classes of applicants.[16] The employees' ac-

[15] See *Stamps* v. *Detroit Edison Co.*, 365 F. Supp. 87, 117-118 (E.D. Mich.), reversed and remanded on other grounds *sub nom. Equal Employment Opportunity Commission* v. *Detroit Edison Co.*, 515 F. 2d 301 (C.A. 6), vacated and remanded, 431 U.S. 951.

[16] For example, the "Vocabulary" section of the sample EPSAT provided by the Company asked for definitions of words like "homage," "diabolic," "imbue," and "droll" (A. 381). The Union could show that the instrument man job does not require such knowledge, or that knowledge of such terms was foreign to the cultural background of some of the applicants. Similarly, Lawrence Kanous, the Company's Director of Employee Training, testified that, although the posted requirement for the instrument man job specified "satisfactory credits for two years of high school math," the mathematics section of the EPSAT was designed to measure a "facility with mathematics at a higher level * * * than is typical of a high school course" (A. 199, 200). The Union could show that certain mathematics questions exceeded the requirements of the instrument man job (see A. 27).

Contrary to petitioner's contention (Pet. Br. 45-46), the Union would not be attempting to show that questions unrelated to the job impaired the validity of the test as a selector of those likely to do well in the job. Rather, it would be showing that, despite its statistical validity, those questions ruled

tual test papers and scores would enable the Union to determine whether, and the extent to which, an employee scored low because he missed those kinds of questions. Finally, the Union needed to link the employees' names with their test scores, not only to verify the accuracy of the scores, but to determine whether a particular employee was entitled to be considered for the job despite a low score on the test.[17]

Enough has been said on the question of relevance. We turn to the basic issue in the case: whether, although the test materials sought by the Union were relevant and useful in connection with the pending grievances, the Board exceeded its remedial authority under Section 10(c) of the Act, 29 U.S.C. 160(c), in

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out particular applicants who were nonetheless capable of performing the job.

The sample tests furnished by the Company (see Pet. Br. 44) were not an adequate substitute for the actual test battery because they did not show the questions which were actually asked the employees. The actual tests could have contained questions which were even more objectionable than those in the sample tests; moreover, the proportion of such questions could have been greater than in the sample tests.

[17] For example, if employee Smith scored low because he missed questions which were not related to the instrument man job, the Union—if it could establish that he had done well in jobs similar to the instrument man job—would be able to argue to the arbitrator that Smith was within the category of those who would do well in the job despite a low test score. Similarly, if the Union discovered that employee Jones scored very high, but that his on-the-job performance left much to be desired, that fact would also be relevant to a determination of the fairness of excluding Smith from consideration for the instrument man job solely on the basis of the test results.

requiring the Company to turn the materials over directly to the Union, rather than to a Union-hired psychologist.

B. The Board's order as enforced by the court of appeals contains protective provisions which are adequate to safeguard the security of the test materials

The Board ordered that the test materials be given directly to the Union, rather than to a Union-selected psychologist, because, in its judgment, the Union was entitled to decide for itself "whether the assistance or expertise of a psychologist is required" (Pet. App. 15a). The Board was not unreasonable in so concluding, since the Union was not challenging the validity of the tests but merely attempting to show that they were "unfair" to particular applicants—a determination calling for practical knowledge of the job.[18] Moreover, the services of a professional psychologist are costly and to force the Union to incur this added expense, if unnecessary for the intelligent processing of the grievance, could well deter the Union from pursuing a grievance which it believed to be meritorious.

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[18] Since the Union was seeking to demonstrate that an employee's failure to answer certain questions correctly should not preclude further consideration for promotion, the basic issue was the relevance of specific knowledge to the job. A psychologist would not necessarily be well-suited to assist in making this judgment. An intelligent layman, familiar with the requirements of the job, would be in as good, or better, position to do so. And, if the Union determined that a professional consultant could be useful, the hiring of an engineer or other person experienced in the mechanics of power plant

1. Petitioner argues that giving the test materials to the Union directly would destroy the future validity of the tests. The premise is that "disclosure of the test materials to 'the Union' naturally leads to disclosure and, therefore, foreknowledge of the actual items on the tests by some or all of the persons who will take the tests in the future * * *" (Pet. Br. 31). However, as the court of appeals correctly observed (Pet. App. 6a-7a), the "answer to Detroit Edison's concern about the possibility of the tests falling into unauthorized hands is found in the Board's adoption of the administrative law judge's limitations on use of the materials by the union." [19]

Recognizing the Company's concern "with protecting the tests from such disclosure as would destroy their future utilization" (Pet. App. 15a), the Board, although ordering the Company to supply copies of the tests and the actual test papers to the Union directly, adopted all of the administrative judge's restrictions on the Union's use of those materials. Thus, while the Union is accorded "the right to see and study the tests, and to use the tests and the information contained therein to the extent necessary to process and arbitrate the grievances," it is directed

operation might well be a more productive expenditure of Union funds.

[19] The administrative judge, whose order petitioner asked the Board to adopt, based his recommendation that the test materials be turned over to a Union-hired psychologist, not on "security" grounds, but on his view, with which the Board disagreed, that the Union would need such professional assistance (Pet. App. 54a).

"not to copy the tests, or otherwise use them, for the purpose of disclosing the tests or the questions to employees who have in the past, or who may in the future take these tests, or to anyone (other than the arbitrator) who may advise the employees of the contents of the tests." (Pet App. 55a-56a.) And, "[a]fter the conclusion of the arbitration proceeding," the Union is required to return "all copies of the battery of tests" to the Company (Pet. App. 56a). Moreover, the court of appeals, in enforcing the Board's order, stated that the "restrictions on use of the materials and obligation to return them to Detroit Edison are part of the decision and order which we enforce"; "[v]iolation of these provisions would be subject to the same sanctions as violation of any provision of a judicially enforced order of the Board" (Pet. App. 7a).

In short, under the Board's decision and order as enforced by the court of appeals, the Union is barred from taking any action that might cause the tests to fall into the hands of employees who have taken or are likely to take the tests,[20] and it would be subject

[20] The Second Circuit's decision in *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420 (Pet. Br. 35-36), is, therefore, clearly distinguishable. In *Kirkland*, the court reversed a district court ruling ordering that a new examination replacing the old, discriminatory test be submitted to the plaintiffs for review, where the plaintiffs themselves would subsequently be taking the new test; the case was remanded to the district judge with instructions to take "steps * * * to insure confidentiality." *Id.* at 427. In the instant case, on the other hand, the order did not require the tests to be submitted to potential test-takers, and indeed

to a contempt citation were it to ignore those restrictions.[21] The federal courts have fashioned similar protective provisions in ordering discovery of sensitive information under Fed.R.Civ.P. 26(c), relying

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made provision to insure that such people did not have access to the tests.

[21] Although the restrictions on the Union's use of the test materials were set forth in the Board's decision (Pet. App. 15a-16a), they were incorporated by reference into the order, which directed the Company to submit the requested test materials to the Union "in accordance with this Decision" (Pet. App. 16a). The Union, as charging party, was a party to the Board proceeding (Pet. App. 14a, 18a), and was aware of, and indeed actively participated in the litigation over, those restrictions. Moreover, if it disagreed with the restrictions which the Board ultimately imposed, it could have sought court review of the Board's decision in that respect. See Section 10(f), 29 U.S.C. 160(f). In these circumstances, the Union, by accepting materials from the Company pursuant to the Board's order as enforced by the court of appeals, would be bound by the restrictions on use of the materials imposed by that order and subject to a contempt citation if it violated them. See *Walker* v. *City of Birmingham*, 388 U.S. 307, 312, 317-319; *United States* v. *Hall*, 472 F. 2d 261, 265-267 (C.A. 5); *Bethlehem Mines Corp.* v. *United Mine Workers*, 476 F. 2d 860, 864, 866-867 (C.A. 3). Cf. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 171-178.

The cases relied upon by *amicus* Chamber of Commerce of the United States (Chamber Br. 13) for its assertion that the Union could not be found in contempt of the instant order are distinguishable. In those cases the courts indicated that the contempt remedy could not be invoked against nonparties who "act independently [of the parties] and whose rights have not been adjudged according to law." *Chase National Bank* v. *Norwalk*, 291 U.S. 431, 437. Here, on the other hand, the Union's rights were adjudged by the court below, and it is subject to the court's order.

on the contempt sanction to deter violations of such provisions.

Thus, in *Rosenblatt* v. *Northwest Airlines, Inc.*, 54 F.R.D. 21, 23-24 (S.D. N.Y.), plaintiffs, in a suit alleging deceptive securities practices, were permitted discovery of confidential bank records with the following limitation:

> Data obtained through the within discovery is to be used only for the preparation and actual prosecution of this action. Accordingly, plaintiffs, their counsel, personnel, agents, experts, and others similarly situated are not to reveal the contents of the documents or use the information contained therein for any other purpose.

Similarly, in *United States* v. *American Optical Co.*, 39 F.R.D. 580, 587 (N.D. Cal.), defendants, in an antitrust suit, were permitted to subpoena confidential documents of a non-party competitor subject to the following limitation:

> The order will * * * direct defendants' counsel to limit their disclosure of the documents to those of defendants' personnel with whom it may be necessary for counsel to confer in order to prepare the defense to this action, and will direct such counsel and personnel not to make copies, or reveal the contents of the documents, or use the information contained therein, for any purpose other than for the preparation of the defense to this action.

The court added (*id.* at 587 n. 10) that it could not properly assume that the defendants "will not comply

in good faith with the conditions of any protective ordered entered by this Court." [22]

So here. The Company assumes that the Union has indicated a preference for promotion by seniority alone and that it therefore has a "motive to discredit testing as a selection device" and would be likely to use the "ammunition" furnished it "to destroy test validity" (Pet. Br. 41-42). Proceeding from this assumption, the Company asserts that adherence to the copying and dissemination restrictions "would be most difficult, if not impossible, for a company to enforce and police once it has given a union the test materials as required by the Board's order. At that

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[22] See also *Julius M. Ames Co.* v. *Bostitch, Inc.*, 235 F. Supp. 856, 857 (S.D. N.Y.); *Babcock & Wilcox Co.* v. *Public Service Co. of Indiana*, 22 F.R. Serv. 2d 340, 341-342 (S.D. Ind.); *United States* v. *Lever Brothers Co.*, 193 F. Supp. 254, 258 (S.D. N.Y.), certiorari denied, 371 U.S. 932; *Textured Yarn Co.* v. *Burkart-Shier Chemical Co.*, 41 F.R.D. 158, 160 (E.D. Tenn.); *Milsen Co.* v. *Southland Corp.*, 15 F.R. Serv. 2d 1268, 1269 (N.D. Ill.).

Cf. *International Union of Operating Engineers, Local No. 49* v. *City of Minneapolis*, 305 Minn. 364, 233 N W. 2d 748. There, the Supreme Court of Minnesota sustained a "trial court's decision ordering [the city] to divulge the questions and answer key [to a test given for the purpose of determining employee promotions] but direct[ed] that [the union] respect the need for the confidentiality of this information." 305 Minn. at 371, 233 N.W. 2d at 753. The court explained that "the public interest in protecting the confidentiality of civil service examinations can be adequately served if [the union] is directed to refrain from disclosing the requested information to applicants who will take this examination in the future." *Ibid.*

point it has lost *control* over the materials, and 'test security' in accordance with Standard I5 of the APA Standards * * * and the EEOC Guidelines incorporating those standards has been breached" (Pet. Br. 39-40). These objections are not soundly based.

In the first place, it is impermissible to presume that the Union will disregard the terms of the order enforced by the court of appeals. As this Court recognized in *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, 676, "[w]e cannot assume that a union conducts its operations in violation of law * * *." Cf. *Whalen* v. *Roe*, 429 U.S. 589, 601-602. There are, moreover, strong reasons, apart from legal sanctions, which induce the Union to conform to the restrictions of that order. Here, the Union's central function is to represent the employees in an ongoing relationship with the Company. Any violation of the restrictions of the order would severely jeopardize the Union's ability effectively to represent the employees in the future. Such bad faith action by the Union might justify the Company in refusing later requests for similar information and could adversely affect the Union's general relationship with the employer. The Union has represented units of petitioner's employees for 35 years (Pet. App. 19a). As the Board observed in a similar situation, *Fawcett Printing Corp.*, 201 NLRB 964, 974, "the parties' long-standing bargaining relationship * * * increases the likelihood that the [Union] would honor a request by [the Company] to keep" the materials confiden-

tial.[23] In sum, the Union's own interests lie in maintaining, not breaching, the security of the tests.

Of course, the disclosure of confidential or other sensitive material under a discovery protective order always involves some danger that the order may be violated[24] and that the violation will go undetected. But that risk must nonetheless be accepted, if, on balance, the interest served by disclosure of the informa-

[23] Moreover, the Union has a significant interest in fairly representing all employees who are members of units for which it is bargaining agent. Since leakage of the tests to some employees would jeopardize the interests of others, and even leakage of the tests to all employees would jeopardize less senior, but better qualified, workers, a violation of the Board's order could open the Union to suits and charges alleging a breach of its duty of fair representation. See *Vaca* v. *Sipes*, 386 U.S. 171. A union which breaches an "agreement" under which information was provided by the employer would probably also violate its duty to bargain in good faith, imposed by Section 8(b)(3) of the Act, 29 U.S.C. 158(b)(3). See *New York District Council No. 9, Brotherhood of Painters* v. *National Labor Relations Board*, 453 F. 2d 783 (C.A. 2), certiorari denied, 405 U.S. 988; *National Labor Relations Board* v. *Communications Workers Local 1170*, 474 F. 2d 778 (C.A. 2). Finally, a union which acts in disregard of the employees' legitimate interests by favoring some over others and destroying a good-faith relationship with the employer runs a substantial risk of being decertified or replaced by the employees as their bargaining agent.

[24] The fact that the Union read sample test questions into the record of the arbitration proceeding (Pet. Br. 41) does not indicate that it would do so with respect to the actual test materials. At the time of that proceeding, the Union was not under the restrictions on use of the materials which are now imposed by the Board's order as enforced by the court of appeals. Moreover, there is no indication that the sample test questions were not available to the general public.

tion outweighs the harm that results from the risk of violation of the protective order. In this case, balancing the right of the employees to be adequately represented by their union representative in respect of grievances against the possibility that the union will disclose the test materials to the employees and that this violation of the Board's order will go undetected, we submit the Board reasonably concluded that the employees' interests should prevail.[25] "Here as in

[25] We are not insensitive to the strong public policy in favor of preventing the compromise of employment tests. Indeed, the United States Civil Service Commission is a major developer and user of employment tests, as are numerous other federal, state, county and local government agencies. There are 581 test forms in the Commission's active test catalogue, developed over many years and involving the commitment of large resources. Governmental recruitment would be seriously disrupted and public confidence eroded if the integrity of the tests were comprised. For those reasons, the Commission has been zealous to guard against undue disclosure and has successfully contended for protective orders which limit exposure of the tests to attorneys and professional psychologists with restrictions on copying or disseminating test materials.

Nevertheless, we have no hesitancy in defending the present decision—where the validity of the tests was not challenged and the tests were relevant to the employee grievances pursuant to the terms of the collective bargaining agreement—because disclosure to the Union itself serves a legitimate function without unduly impinging on privacy interests of the employees, because the Union's institutional interests militate against improper disclosure of the tests and because the Board's order includes specific protective provisions which, in the circumstances of this case, can reasonably be expected to safeguard the integrity of the tests. It is, moreover, appropriate to defer, in this context, to the considered judgment of the Board, charged by Congress with special responsibility for effectuating labor policy.

many other contexts of labor policy, '[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review'." *Beth Israel Hospital* v. *National Labor Relations Board*, No. 77-152, decided June 22, 1978, slip op. 17.

2. Other challenges to the Board's disclosure order may be answered briefly.

a. It is suggested that turning over the test materials to the Union would violate Standard I5 of the *Standards for Educational and Psychological Tests and Manuals*, published by the American Psychological Association (hereinafter "APA Standards") (1974), and referred to in the Guidelines issued by the Equal Employment Opportunity Commission to implement Title VII of the Civil Rights Act of 1964.[26] The con-

[26] Section 703(h) of that Act, 78 Stat. 257, 42 U.S.C. 2000e-2(h), permits an employer "to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." Pursuant to Section 703(h), the EEOC has developed "Guidelines on Employee Selection Procedures, which state that "properly validated and standardized employee selection procedures can significantly contribute to the implementation of non-discriminatory personnel policies * * *." 29 C.F.R. 1607.1 (Pet. App. 88a-89a). The Guidelines further state that evidence in support of a test's validity must be based "on studies employing generally accepted procedures for determining criterion-related validity, such as those described in 'Standards for Educational and Psychological Tests and Manuals' published by American Psychological Association * * *." 29 C.F.R. 1607.5 (Pet. App. 92a-93a).

tention makes much of little. Standard I5 merely states that: "The test user shares with the test developer or distributor a responsibility for maintaining test security." There is nothing in the Standard which suggests that a test user would fail in his responsibility to maintain test security by turning over test materials pursuant to a court order which contains provisions designed to keep the tests secure.

The argument premised on Standard J2 (Pet. Br. 34-35) fares no better. That standard provides that test scores should "ordinarily be reported only to people who are qualified to interpret them" and that, if reported, the scores "should be accompanied by explanations." There is no prohibition against reporting scores to non-psychologists, as long as the scores are accompanied by explanations. The Board's order, of course, does not bar petitioner from providing such explanations. The "Comment" to J2 recognizes that it is an "unanswered" question whether untrained people should be given test scores, or only interpretations, and also notes that there is no definitive answer as to who within an organization should have access to scores, except that "curious peers" should not. The Union, as the duly certified representative of all the employee applicants, is certainly not a "curious peer" in processing properly filed grievances under the collective bargaining agreement. Moreover, Standard J2.1 provides that an "individual tested (or

his *agent* or guardian) has the right to know his score and the interpretations made" (emphasis supplied). The Union, as the employees' bargaining agent, falls within this category.[27]

b. The Company further complains that the Board's order requires that the tests and test scores be divulged to "the Union," without specifying whether this means "the individuals who comprise the executive officers of the Union, its Executive Board, its grievance committee or * * * the entire membership" (Pet. Br. 40). The point is frivolous. The materials were requested in connection with the processing of grievances and the order specifically precludes the Union from disclosing them to employees who have taken or will take the tests; accordingly, "the Union" clearly does not mean the union membership generally, but rather those officials of the Union charged with responsibility for processing grievances under the collective bargaining agreement.

Nor is there any reason to fear that, if this group included some members of the bargaining unit, the knowledge "gained by these individuals pursuant to the Court enforced Board Order could be used by them to gain an unfair competitive edge on others not privy

[27] Nor does the Board's order violate the provision of the EEOC Guidelines that: "Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores." 29 C.F.R. 1607.5(b)(2) (Pet. App. 94a). As shown, the protective provisions of the Board's order as enforced by the court of appeals are a proper safeguard to protect the security of the test materials.

to the test or test scores" (Pet. Br. 40). Nothing in the Board's order would preclude the Company from requiring the Union to name the employees on the grievance committee to whom it proposed to show the test materials and from excluding those employees from the test-taking pool in the future.

c. Finally, the Company contends that, even if the Union were found to violate the restrictions imposed by the Board and the court of appeals, a contempt remedy "is speculative at best." It adds that, even if the Union were liable in contempt, "there is no adequate remedy for the violation, since the tests will have been hopelessly invalidated and it would take years to validate a new test" (Pet. Br. 42). To be sure, only the Board may institute contempt proceedings. But there is no reason to assume that it would fail to do so if it learned that the Union had violated the restrictions imposed by the Board and the court. One must assume that the Board is anxious to vindicate its own orders and to assure that court decrees enforcing them are not flouted.[28]

Moreover, the efficacy of the contempt sanction is properly measured by the deterrent effect which the availability of the sanction produces. Whether or not

[28] As shown (n. 21, *supra*), the Union may be held in contempt for violating the court's order even though it was not a party to the proceedings in the court of appeals. Since willfulness is not required to establish civil contempt (see *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 197), petitioner is mistaken in suggesting that "inadvertent disclosure would be completely beyond the contempt powers of the courts" (Pet. Br. 42).

a large monetary fine would fully compensate the Company if the test security were breached, the threat of having to pay such a fine is likely to deter the Union from taking action that would invalidate the tests.

C. Disclosure of the test scores and test papers linked with the names of those tested does not impair the legitimate interests of employees and psychologists

1. Petitioner contends (Pet. Br. 52) that it should not be required to disclose the scores made by specific applicants because it promised the applicants that the scores would be kept confidential. We answer that the Union cannot be deprived of information which is relevant to the discharge of its responsibility to represent fairly all of the unit employees merely because the Company has unilaterally decided to assure employees that the information would be kept confidential. See *General Electric Co.* v. *National Labor Relations Board*, 466 F. 2d 1177, 1185 (C.A. 6); *Curtiss-Wright Corp.* v. *National Labor Relations Board*, 347 F. 2d 61, 71 (C.A. 3). Nor can the Company condition the release of such information upon the Union's obtaining the consent of the employees involved (see Pet. Br. 44). The Union having been selected by the employees as their bargaining agent, Section 9(a) of the Act, 29 U.S.C. 159(a), empowers it to decide, without obtaining individual employee consents, whether certain information is needed for the adequate performance of its representative function. See *Electric Auto-Lite Co.*, 89 NLRB

1192, 1199-1200; *Boston Herald-Traveler Corp.*, 110 NLRB 2097, 2100, enforced, 223 F.2d 58 (C.A. 1). There is, in any event, no indication that any person tested has objected to disclosure of his score.

No doubt, confidential information about employees should be withheld where disclosure would impose a "clear and present danger" of harassment and violence, *United Aircraft Corp.* v. *National Labor Relations Board*, 434 F. 2d 1198, 1207 (C.A. 2), certiorari denied, 401 U.S. 993. But petitioner produced no probative evidence of such a danger here.[29] Indeed, since the Union's position as bargaining representative depends upon retaining the confidence of the employees, it has a strong incentive to guard against dissemination of any information, such as employee names and scores, which could possibly lead to embarrassment or harassment of employees.

2. Similarly without merit is the American Psychological Association's contention (APA Br. 9-12) that disclosure of employee-linked scores and test papers ignores the employee's interest in a confidential relationship with the psychologist. Contrary to the Association's view, this case does not involve "a testing or therapeutic situation [where] a psychologist's clients may be called upon to reveal personal

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[29] The record merely contains the vague assertion of Company psychologist Roskind that "many, many years ago * * * several individuals whose test scores were known to themselves and other individuals that worked with them, were harassed so much and called stupid and dummy and so on, to the point where they actually left * * *" (A. 84).

thoughts, experiences, and memories" (*id.* at 10). The tests in question are for the most part no more than tests of acquired knowledge (see *supra*, n.4, n.16). They are not psychological profiles; nor do they involve any counseling relationship between the Company psychologists and the employees. Indeed, so far as the tests are concerned, the only contact between the Company psychologists and the employees was the actual administration of the test battery. After the tests were taken by the employee-applicants, the "relationship" ceased; the psychologists graded the tests and told the Company who "passed" and who did not. In these circumstances, the Association's suggestion (APA Br. 11) that the test-taking here was a "client communication[] with a psychologist," within the purview of various state laws on testimonial privilege, borders on the frivolous.[30]

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[30] APA also contends (APA Br. 12-17) that the Board's order violates privacy interests of the employees. However, no employee has raised any such objection. Moreover, as this Court pointed out in *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767, in rejecting an employer's contention that disclosure of employees' names and addresses to unions conducting organizing campaigns would violate their privacy interests and subject them to harassment: "The disclosure requirement furthers [the objectives of the Act] by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses. It is for the Board and not for this Court to weigh against this interest the asserted interest of employees in avoiding the problems that union solicitation may present." And see *Whalen* v. *Roe*, *supra*, 429 U.S. at 602. Similarly here, the Board has reasonably concluded that the asserted interest in employee privacy is outweighed by the Union's legitimate interest in disclosure to it.

3. Finally, there is no merit in the Association's contention (APA Br. 17-23) that its *Ethical Standards of Psychologists* (1977 rev.), and state law (which incorporates the Standards), would be breached by compliance with the Board's order to provide the Union with the test scores of the applicants. While Principle 5 of the *Ethical Standards* (formerly Principle 6, A. 431-432) imposes an obligation on the psychologist to safeguard "information about an individual that has been obtained * * * in the course of * * * teaching, practice, or investigation," subsection (b) of the Principle provides that "evaluative data concerning * * * employees" may be discussed "with persons clearly concerned with the case" if "only data germane to the purposes of the evaluation" is presented and "every effort [has been] made to avoid undue invasion of privacy." Since the Union is a party "clearly concerned with the case," and the employees' test scores and papers are "data germane to the purposes of the evaluation," the release of such information to the Union, under the safeguards of the Board's order, would not appear to violate subsection (b) of Principle 5.

Nor is there any obstacle in subsection (c) of Principle 8 (paralleling former Principle 14, A. 438) which provides that psychologists should "strive to insure that the test results and their interpretation are not misused by others" (APA Br. 19). The preceding part of that subsection merely states that, "[i]n reporting test results, psychologists [should] indicate any reservations regarding validity or reliability resulting from testing circumstances or in-

appropriateness of the test norms for the person tested." Nothing in the Board's order would preclude the Company psychologists from giving such explanations with respect to the employee scores which are furnished to the Union.

The Association's contention that compliance with the Board's order would result in a breach of the APA *Ethical Standards* rests, at bottom, on the assumption that the Union will inevitably disclose the test scores to the Union membership generally (APA Br. 19, n. 28). As we have said, wholly apart from the restrictions of the Board's order,[31] there is good reason why the Union would not do so. Nor does the "Union's refusal to place the scores in the hands of a psychologist qualified to interpret them" show that "the Union may indeed intend to use the scores in a manner harmful to those tested" (APA Br. 19-20). Since the Union was not attacking the validity of the tests, a trained psychologist was not necessarily required (see *supra*, pp. 18, 23-24).

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[31] Contrary to APA's view (APA Br. 20, n. 30), the restrictions of the Board's order do not apply only to the test battery. Since the administrative judge, whose restrictions on use of the test materials were adopted by the Board, initially directed the Company "to supply copies of the battery of tests * * *, including the actual test papers of the applicants (necessary to check the accuracy of the scoring of the tests) * * *" (Pet. App. 55a), it is reasonable to construe his subsequent references to "the tests" as encompassing both the test battery and the "actual test papers of the applicants." To the extent that the employees' test scores appear on their test papers (see A. 89, 379, 446), they would thus be covered by the Board's protective order.

In any event, the APA *Ethical Standards*, and state law, both must give way to the paramount federal law.[32] See *National Society of Professional Engineers* v. *United States*, No. 76-1767, decided April 25, 1978; *Nash* v. *Florida Industrial Commission*, 389 U.S. 235.

We conclude that the Board's remedial power, conferred by Section 10(c) of the Act, 29 U.S.C. 160(c), "is a broad discretionary one, subject to limited judicial review," *Fiberboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 216, and that its order should not be disturbed unless it can be shown "that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 540. In our submission, the Board's ruling does not overstep the limits of its authority.

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[32] Indeed, APA acknowledges (APA Br. 22, n. 33) that it "does not assert that the State of Michigan or the APA would discipline Dr. Roskind, Detroit Edison's industrial psychologist, for disclosing the test scores or papers pursuant to the court's order."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

THE DETROIT EDISON COMPANY
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent.

REPLY BRIEF OF PETITIONER THE DETROIT EDISON COMPANY

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I

THE BOARD'S BRIEF FAILS TO DISCLOSE THE RELEVANCE OF THE TEST MATERIALS

In seeking to establish the relevance of the test materials, the Board's brief first attempts the "short" answer (Bd. br., p. 16) that the Company is foreclosed from making the relevance argument at all with respect to the tests. This argument was fully answered in the Company's initial brief (Co. br., pp. 48-49).

When forced to supply a response on the merits of the relevance issue, the Board's brief fares no better. The factual centerpiece of the Board's position is that the test battery measures specialized, acquired knowledge required of an instrument man and that the Union needed the tests to determine whether the test

questions "called for specialized knowledge beyond the requirements of the instrument man job, or which did not fairly measure the aptitude of certain classes of applicants" (Bd. br., pp. 21, 22, 38). The problem with this premise is that it is factually incorrect. As found by both the arbitrator and the Administrative Law Judge, the test battery does not measure specialized, acquired knowledge required of an instrument man, but rather the *aptitude* of a person to *become* an instrument man.[1]

The second and related factually erroneous premise of the Board's brief is the repeated assertion, without benefit of record reference, that the Union was not challenging the validity of the test battery (Bd. br., pp. 12, 13, 18, 23, 31, 40). The record discloses no such disclaimer by the Union. The Union's initial written request specified no reason at all for the information request (A. 121). The second Union request specified that "what this advocate needs to know is if the questions on these tests are reasonably relevant to the job being considered" (A. 124). At the unfair labor practice hearing, the Union representative testified that he needed the test battery because it was "an entirely new dimension" (A. 24), and that he had to know "the reasonable relevance of the tests to the job" (*Ibid.*). On cross-examination, the Union representative ad-

[1] The Administrative Law Judge found specifically that "these tests are not designed to test the skills or knowledge of the applicant which may be related to the job, but the capacity or aptitude of the employee to be trained and to do the job efficiently" (P.A. 22a). And the arbitrator found that "face validity does not prove or disprove the validity of the test in determining the aptitudes necessary for successful job performance. There would be justification in the Union's request if the test were measuring job knowledge" (P.A. 72a).

mitted that he wanted to see the tests to determine their "face validity" (A. 27).[2] At the arbitration proceeding, the Union representative was even more pointed: "So our position is that the tests are discriminative [sic]. Therefore management is arbitrary and capricious" (A. 157); and again, "It's [referring to the test battery] an obstacle. It's an impediment" (A. 158). The Board itself in its Reply Brief in the Court of Appeals acknowledged that the Union was disputing the validity of the test battery. On that occasion, the Board stated:

> "Rather this is a case where 'test validity' is in issue and the Company has asserted that the test is valid on the basis of criterion related validity studies. *The Union has chosen to contest the validity of the tests* on the basis of content validity and possibly construct validity" (Bd. Reply Brief in Sixth Circuit, p. 5) (emphasis added).

Thus the twin postulates of the Board's relevance argument—that the tests measured acquired skillls necessary for the instrument man job and that the Union didn't challenge the validity of the test battery—are both factually erroneous. These errors reduce the Board's argument to a plea for the right of the Union to view a test battery which measures only a person's aptitude to perform the instrument man job in an effort to challenge the validity of the test.[3] Since the test bat-

[2] Face validity is the appearance to a layperson of the relation between the test item and the requirements of the job (A. 201).

[3] The Board's brief is ambivalent on the validity of the test battery. While assuring the reader at several points that the validity of the test battery is not in issue, the brief implies that the high correlation between good results on the test battery and good performance on the job is no different than the positive correlation between teacher's salaries and the consumption of liquor (Bd. br.,

tery measures aptitude and not the acquired skill needed for the job, there may be no apparent relationship between each test item and the specific knowledge that an instrument man must have to perform the job. Thus an examination by the Union of the individual items on the aptitude test would, as the Arbitrator held, prove nothing (P.A. 72a).

The "fall back" position of the Board apparently is that even if the test battery is valid in predicting job performance, some applicants who score poorly on the test may become successful instrument men. That, of course, is true in any aptitude test program where the correlation coefficient is less than perfect, but it begs the question of the Union's necessity to see the actual test battery. The present case provides an excellent example of how the inevitable conflict between test scores and other job attributes are resolved on a basis that is practical and equitable to all parties. In his decision the Arbitrator ruled that the Company should re-examine certain employees who failed to meet the cutoff score to determine whether there was something in the person's background that might tend to offset his lower score. This is the safety valve that assures that the test battery is not used to "rule out particular applicants who were nonetheless capable of performing the job" (Bd. br., pp. 21-22, n. 16). And yet it is evident from the arbitration proceeding that the equi-

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p. 20, n. 14). That observation overlooks the fact that the validation study performed in this case ranked the incumbents on the job with reference to 23 specific, objective job functions, and that the relationship between test performance and job performance was hypothesized in advance, based on scientific research, as opposed to the "chance" relationship between the consumption of liquor and teacher's salaries.

table resolution of these individual cases can be achieved without the necessity of disclosure to the Union of tests and test scores.

A related "fall back" position of the Board apparently is that even though the test battery may be statistically valid, it may not be "fair" to certain employees and that the Union should be allowed to screen the tests to determine whether they "ought to be amended in certain particulars" (Bd. br., p. 19). There was no evidence in the record that the Union was qualified in any way to co-author the test items since, once again, the test measured aptitude, not acquired skills. Nor is there any room in this case for a distinction between "validity" and "fairness". In fulfillment of its good faith bargaining obligation, the Company has been more than "fair" to the Union by providing to the Union a wealth of information concerning the Company's testing program. Yet the Board and its current brief writers seek to extend this obligation to unreasonable and unprecedented limits by requiring disclosure of test information which is entirely unnecessary to the fulfillment of the Union's responsibility. The Board's brief also ignores the fact that ultimate fairness was achieved in this case by the accommodation reached in the grievance and arbitration process between the interests of the Company, the Union and the employees.

II

THE BOARD'S ARGUMENT THAT ITS "PROTECTIVE" ORDER WILL INSURE THE SECURITY OF THE TEST MATERIALS IS NOT PERSUASIVE

Stripped to its essentials, the Board argument is that its "protective" order is sufficient to safeguard the integrity of the tests. Only the premise of the argument

is correct. That premise, tucked away in footnote 25 of the Board's brief, is that there is a "strong public policy in favor of preventing the compromise of employment tests". The Board's conclusion to that premise is to wave the magic wand of a "protective" order over the test materials, thereby once again leaving it to the overburdened federal courts to sort out the many problems inherent in such an order. Those problems were adequately set out in the Company's initial brief (Co. br., pp. 39-43). The Board's response to those problems is similar to a person's attempt to stop holes in a dam with its fingers. It simply doesn't work. There remain substantial doubts (1) whether the Union is even subject to the "protective" order since it was not a party to the Court of Appeals proceeding, (2) exactly what persons would be permitted to view the materials, (3) whether the Union's interest in promotion by seniority alone would motivate it to discredit the Company's testing program,[4] (4) whether persons who viewed the tests might thereafter be entitled to take the tests,[5] (5) whether disclosure of the test materials would violate the EEOC Guidelines on testing, (6) whether inadvertent disclosure would be actionable,[6]

[4] The Board's brief accuses the Company of an "assumption" that the Union prefers promotion by seniority alone. That "assumption" is contained in the uncontradicted testimony of the Company's Director of Union Relations in this case (A. 160-169).

[5] The Board's assumption in its brief (Bd. br. p. 35) that the Company could extract a pledge from Union officers that they would not bid on any jobs where they had viewed the tests would likely be viewed by the Board itself as unlawful discrimination based on Union activity in violation of Section 8(a)(3) of the Act.

[6] The Board's citation of *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 197 (1949), for the proposition that inadvertent disclosure would be actionable does not meet the point, since the holding of that case was merely that "willfulness" is not required to find civil contempt. We are, moreover, puzzled by the reference to page 197 of that decision, which is a portion of the dissenting opinion.

(7) whether disclosure would violate the APA Code of Ethics which is incorporated in the laws of many States, (8) whether there is any adequate remedy for a violation of the order, and (9) whether other companies faced with similar demands for test information will have to individually litigate through the Board and Court processes to obtain similar judicial "protection" against disclosure.

There are simply too many holes in the dam and not enough fingers.

In an attempted justification of the "protective" order, the Board's brief claims that it resulted from a balancing of the employee's interest in having the test information provided to the Union with the employer's interest in not having the materials disclosed (Bd. br., p. 31).[7] Conspicuously absent from this private equation is the *public* interest. The Company is a large regulated public utility. There is a significant public interest, quite apart from the normal frictions of union-employer relations, in having only qualified employees on this job of critical importance to the public. Any balancing of private interests is woefully shortsighted if it contains the ingredients that could result in an unqualified person becoming an instrument man.

[7] In the conclusion of this Company's opening brief, the Company demonstrated other important interests the Board failed to appreciate in ordering disclosure of the test materials.

The Board's "balance" contains those ingredients.

Respectfully submitted,

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This brief of the Cities of Los Angeles and San Diego, California, as Amici Curiae is filed by the City Attorneys of those cities pursuant to Rule 42(4) of the Rules of the Supreme Court.

INTERESTS OF THE AMICI CURIAE

The Cities of Los Angeles and San Diego are municipal corporations within the State of California. The interests of those cities arise from their positions as public sector employers which have charter requirements to hire individuals based upon merit. Pursuant to merit principles, both cities use various personnel tests to hire and to promote individuals in the classified civil service.

Further, both cities have collective bargaining relationships with employee unions, pursuant to California Meyers-Milias-Brown Act. See California Government Code §§ 3500-10 (West 1978 Supp.). Although neither Los Angeles nor San Diego is covered by federal labor law provisions, California courts look to this Court's interpretation of federal law in considering issues under the California statute. See Fire Fighters Union, Local 1186 v. City of Vallejo, 12 C.3d 608, 616-17 (1974).

Specifically, the City of Los Angeles employs approximately 47,000 individuals.

Of those employees, 39,707 are in the classified civil service, and are appointed to approximately 1,496 civil service classifications. Pursuant to the City's Charter, each of those civil service classifications require a merit procedure to select the most qualified applicants among those presenting themselves for consideration. Further, approximately 87 percent of all city employees are in bargaining units represented by a union. The City of Los Angeles maintains "Memoranda of Understanding" pursuant to the applicable California law with approximately 15 such unions, representing about 42 bargaining units. Similarly, the City of San Diego employs approximately 6,800 individuals, in 420 civil service classifications. That city negotiates with 4 public employee unions, representing 8 bargaining units covering 6,184 budgeted positions.

Both Los Angeles and San Diego have been subject to employee discrimination suits brought by the federal government, alleging that various personnel tests

are discriminatory against Black and Spanish-surnamed minorities and women. The most recent such suit in Los Angeles, filed on June 2, 1977, alleges race, sex, and national origin discrimination in the Los Angeles Police Department. That matter has been stayed by the federal court pending the appeal of a sex discrimination suit involving similar issues which had been decided in favor of the City 20 days prior to the filing of the Government's complaint. See Blake v. City of Los Angeles, 435 F.Supp. 55 (C.D. Cal. 1977) (appeal pending). The City of San Diego was the defendant in a similar suit (filed on December 21, 1976) covering all departments except the police department. That dispute was settled by a consent decree executed by the district court on December 17, 1977.

Thus, both cities before this Court as Amici Curiae have interests in maintaining personnel testing programs to fulfill the merit system requirements of their municipal charters, as well as interests in sustaining those personnel tests in litigation. In accord with

those interests, these Amici limit their comments to the need for confidentiality of test materials, and do not address the issues which relate to the disclosure of test scores.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this brief, the Amici argue that confidentiality of personnel test materials is necessitated by the nature of personnel testing. In the absence of confidentiality, an employer would have no way of knowing whether the test was predicting an applicant's ability (and, assuming a job-related test, that applicant's ultimate job performance), or whether the applicant's performance on the test was merely a function of his or her memory.

Further, the performance of test takers on an examination which has been disclosed would be "unreliable". For example, an applicant who had recently reviewed a disclosed examination would be more likely to do better on the examination immediately after that review than on an administration of that examination several months later. In light of the

impact of the disclosure of test materials on the usefulness of personnel tests, any balancing of interests under federal labor law should result in maintaining the confidentiality of those materials.

The Amici further urge the Court to refrain from basing a holding in favor of the Respondent, Detroit Edison Company (hereinafter, "the Employer"), on an interpretation of guidelines drafted by federal compliance agencies having litigating responsibilities. In the experience of the Amici, such language in opinions by this Court leads to an increasingly technical interpretation of those guidelines by federal compliance agencies and certain lower courts. Such an interpretation, in turn, leads to greater pressure on employers to adopt quota hiring based upon the numerical parity of various groups in the general population. That result, the Amici submit, is not in accord with Title VII of the 1964 Civil Rights Act, as amended.

On the basis of those two arguments, the Amici ask the Court to uphold the

Employer in this action, and to limit its rationale for that decision to the nature of personnel testing. Similarly, the Amici ask that the Court utilize the concept of "job-relatedness", if at all, consistently with the "much more sensible construction of the job-relatedness requirement" interpreted in Washington v. Davis, 426 U.S. 229, 251 (1976). Further, if federal "guidelines" require discussion in the context of this opinion, the Amici suggest that such guidelines be accorded only "consideration". General Electric Co. v. Gilbert, ____ U.S. ____, 97 S.Ct. 401, 411 (1976).

Alternatively, if the Court were to hold against the Employer on the facts of this case, the Amici ask the Court to recognize that such decisions should be made upon a case-by-case basis. Specifically, the fact that personnel tests used by municipalities are necessitated by a need to implement merit principles as an alternative to the once prevalent "spoils" system may call for a different result. Cf. Kirkland v. New York State Bd. of Correctional Services, 520 F.2d 420, 428

(2d Cir. 1975).

ARGUMENT

I

THE CONFIDENTIALITY OF THE EMPLOYER'S TESTS SHOULD BE MAINTAINED DUE TO THE NATURE OF PERSONNEL TESTS AND THE RISK OF HARM TO THE EMPLOYER AS A RESULT OF DISCLOSURE

Established authority mandates that, in determining whether the test materials at issue here should be disclosed, the lower court should have considered the circumstances of the particular case. See NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153-54 (1956). It is the position of the Amici that both the lower court and the National Labor Relations Board misunderstood the nature of personnel testing, and that misunderstanding led to an erroneous balancing of interests between the employer and the union.[1/] In the following paragraphs, the

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1/ The Amici submit, without further discussion, that the "restriction" placed upon disclosure of test materials by the union provides inadequate protection for test confidentiality. See Case Comment, "Psychological Aptitude Tests and the Duty to Supply Information: NLRB v. Detroit Edison Co.", 91 Harv. L.R. 869, 875-77 (Feb. 1978).

Amici discuss the nature of personnel testing as it applies to the instant dispute.

A. The Nature of Personnel Testing Requires Test Confidentiality.

Generally speaking, "a test is a systematic procedure for comparing the behavior of two or more persons." L. Crombach, Essentials of Personnel Testing 21 (2d ed. 1960). The assumption underlying the use of such tests is that all individuals vary along "trait dimensions" which are measurable characteristics of individuals, and that such variation "is related to variation along a job performance dimension." R. Guion, Personnel Testing 8 (1965). A test is useful to an employer if individuals performing relatively better on the test generally perform relatively better on the job. The predictive value of the test lies in its usefulness in screening numbers of potential employees; such tests are necessarily fallible in predicting success of individual applicants. See, e.g., E. McCormick and J. Tiffin, Industrial Psychology 98 (6th ed. 1974).

In a broad sense, the extent to which a test is capable of predicting the success

of employees on a job is its "validity". Id. at 101. However, lawyers and laymen often confuse the concept of "validity" with a formal "validation study". For example, a statistical validation study is the written report of an experimental evaluation of the validity of a test, conducted by an industrial psychologist pursuant to certain scientific principles. Although experimentalists in the field of test validation uniformly stress the desirability for such formal evaluation,[2] a "valid" test may or may not have been "validated". Further, a test which was once "validated" may or may not continue to be "valid" for a particular job if there have been shifts in such variables as the nature of applicant population. See R. Guion, Personnel Testing, supra, at 21.

The associated concept of "reliability" is also important to the consideration of the instant case. Generally, industrial psychologists say that a test score is "reliable" if test administrators "can

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[2] See, e.g., E. McCormick and J. Tiffin, Industrial Psychology, supra, at 102.

reasonably expect that the score [individual applicants] got today is about the same as the score [they] would get a week from today, or that the score [individual applicants] got on one form of a test is nearly equivalent to the score [they] obtained on another form of the same test." M. Mandell, The Selection Process 288 (1964).

To ensure consistency in testing, or "reliability", industrial psychologists insist on the standardization of testing conditions. Instructions are given relating to the consistency of the testing area (i.e., ventilation, lighting, desk space, and audibility of instructions), the state of the individual being tested (i.e., temporal proximity to major life changes, such as army induction; illness; and fatigue), and the standardization of the directions given to the test subjects. See, generally, L. Crombach, Essentials of Personnel Testing, supra, at 43-46. If individuals having more favorable test conditions are competing with other test subjects having relatively less favorable conditions, the results of those tests may be neither "reliable" nor "valid".

The security of test material is also "of vital importance to the reliability and validity of test results." C. Lawshe and M. Balma, Principles of Personnel Testing 66 (2d ed. 1966). For that reason industrial psychologists advise that access to test materials should be controlled, and kept in locked cabinets when not in use. Id. See, also, R. Thorndike, Personnel Selection 268-70 (1949). The need for such careful control of test contents is obvious: If an individual taking a test has had any exposure to all or a portion of the test materials, his ability will not be fully tested by that administration of the test. Thus, one cannot expect a disclosed test to have predictive value, nor can one expect that individual's results to be similar to the results which might have been obtained by utilizing another form of the same test.

B. The Disclosure of the Contents of Personnel Tests will Impede or Prevent the Formal Process of Test "Validation" by the Experimental Method.

In addition to reducing the validity and reliability of personnel tests, the disclosure of test materials will also have a

serious impact upon an employer's ability to conduct formal validation studies. Statistical or "criterion-related" studies[3/] generally are based upon the statistical theory that "the investigator must reach

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3/ Although this Court has recognized that "there is no single method for appropriately validating employment tests for their relationship to job performance" (Washington v. Davis, 426 U.S. 229, 247 n. 13 (1976)), the employer before the Court had apparently relied upon the criterion-related validation method in the formal validation studies of the test at issue here. It should be noted that experimentalists have suggested other quite rigorous standards for the formal evaluation of personnel tests by the "content" method. See American Psychological Association, Standards for Educational & Psychological Tests at E12 (revised ed. 1974) (hereinafter, "APA Standards") and the Equal Employment Opportunity Commision's "Guidelines on Employee Selection Procedures", 29 C.F.R. § 1607.5(a) (hereinafter, "EEOC Guidelines").

Similarly, rather than permitting an employer to simply present testimony of the critical tasks in a specific job, certain experimentalists apparently would have this Court require a formal "job analysis" for every job subject to an employment discrimination charge based upon the use of a personnel test. See APA Standards at E3.1, and the EEOC Guidelines at 29 C.F.R. §§ 1607.4(c) & 1607.5(b)(3).

conclusions entirely on the basis of the data in the present investigation." See L. Crombach and G. Gleser, Psychological Tests and Personnel Decisions 153 (2d ed. 1965). Thus, in conducting such "validation", the industrial psychologist will formulate a "hypothesis" that there is a relationship between the test (or predictor) and the measure of job performance (or "criterion"). See R. Guion, Personnel Testing, supra, at 23. If a "criterion-related" validation study fails to demonstrate evidence of validity, the results of that study do not mean that the test is not adequately predicting performance for the employer. Rather, a negative result in a study may mean only that the investigator failed to utilize a proper hypothesis, and that the test is not necessarily related to the selected "criterion". Id. Alternatively, a failure to demonstrate validity in a formal study may be a result of a lack of "statistical power" resulting from having too few persons included in the study. See Schmidt, Hunter & Urry, "Statistical Power in Criterion-Related Validation Studies", 61 Journal of Applied Psychology 473 (1976).

The experimental method mandates that certain conditions must be controlled by the researcher. For example, the industrial psychologist conducting a statistical validation study must keep "variables not a part of the hypothesis from influencing the results of the experiment." 4/ R. Guion, Personnel Testing, supra, at 24. Knowledge of test content by individual test subjects would be a "contaminating influence", and would have a detrimental impact on a formal investigation of test validity by a statistical validation experiment. Therefore, the disclosure of test materials will

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4/ The Government, in its "Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae" (filed April 1975) in Albemarle Paper Co. v. Moody (U.S. Supreme Court Nos. 74-389 & 74-428) at 44, recognized that experimental technique in criticizing Albemarle's failure to ensure that the performance evaluators who were recording the "criterion" (for its validation study) were unaware of the test performance of the evaluated employees. In that brief, the Government noted that "The EEOC Guidelines . . . , like the APA Standards . . . , deem it essential that tests be administered under controlled and standarized conditions . . . . " Id.

proscribe the use of statistical validation studies as evidence of test validity.

C. A Balance of the Interests of the Employer and the Union in Test Confidentiality Mandates That Such Tests be Disclosed Only to a Professional Psychologist.

The Amici submit that the direct or potential disclosure of any personnel tests to individuals who may be test subjects is directly contrary to the business interests of an employer utilizing those tests. Both the reliability and the validity of such tests would be impaired to the extent that test subjects become aware of all or part of the contents of those test materials. Further, future formal validation studies will be impaired or made impossible due to the loss of control over the experimental conditions which must surround statistical validation efforts.

In the instant case, the employer apparently has incurred great expense in conducting formal statistical validation studies. See Respondent's Exhibits Nos. 13 & 14, reprinted in Appendix at 343 & 354. Because of the loss of validity and

reliability which will arise from test disclosure, the employer's investment in the experimental designs which resulted in those formal studies may be wasted.

In contrast, the union's interest in obtaining test materials is speculative at best. As the lower court recognized,

> It is possible that the union will not be able to make any determinations about the fairness of the tests by itself and that it will need the advice of a psychologist. . . . This may be a case where it would have been better if the union and Detroit Edison had been able to agree upon a neutral party to receive the documents . . . . [NLRB v. Detroit Edison Co., 560 F.2d 722, 726 (6th Cir. 1977).]

In the instant case, information pertaining to the predictive value of the tests was contained in the formal validation studies, and the disclosure of those studies by the employer accommodated the union's legitimate interest in ensuring test validity. Therefore, the Amici respectfully suggest that any balancing of interests regarding test disclosure should have resulted in the maintenance of the confidentiality of test materials.

II

THE COURT'S HOLDING THAT THE EMPLOYER'S PERSONNEL TESTS SHOULD REMAIN CONFIDENTIAL SHOULD NOT BE BASED UPON DEFERENCE TO VARIOUS FEDERAL COMPLIANCE AGENCY "GUIDELINES"

Because of the role of the Amici as merit system employers, and as employers which have been engaged in litigation concerning allegations of discrimination based upon the use of personnel tests, the Amici are as concerned with the rationale which the Court may utilize to uphold the confidentiality of test materials as they are about the issue of confidentiality itself. Those concerns are discussed in this part of the Brief.

A. A Decision Giving "Deference" to Guidelines Will Give Credibility to Policy Statements Known to be Professionally and Legally Falacious.

If a determination of the issue before the Court is based upon the language of Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures (29 C.F.R. § 1607 et seq.) (the "EEOC Guidelines"), this Court would enhance the credibility of administrative

standards which are known to be professionally unsound, and which were drafted in a legally questionable administrative action. Those guidelines, as well as other guidelines drafted by federal compliance agencies with litigation responsibilities, contain language which is calculated to lighten the Government's burden in the trial of an employment discrimination matter and to enhance its bargaining position in pretrial negotiations. The Amici ask the Court to decline from "deferring" to any such guidelines in this case in light of the following considerations.

1. The EEOC Guidelines erroneously imply that the process of formal "validation" is the only way to demonstrate job-relatedness. See EEOC Guidelines at 29 C.F.R. §§ 1607.2 - 1607.5. In fact, there are circumstances in which it is not feasible or not appropriate to utilize a formal validation technique. Federal Executive Agency "Employee Selection

Guidelines"[5] at § 3b, 41 Fed. Reg. 51736, 51744, 51752 (hereinafter, the "FEA Guidelines"). Further, the EEOC Guidelines apparently require experimental designs which are technically impossible. See Henderson v. First Nat'l Bank of Montgomery, 360 F.Supp. 531, 545 (M.D. Ala. 1973); Note, "Developments in the Law--Employment Discrimination and Title VII of the Civil Rights Act of 1964", 84 Harv. L.R. 1109, 1126-31 (March 1971).[6]

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[5] Those guidelines were published by the Department of Justice, Department of Labor, and the Civil Service Commission as members of the Equal Employment Opportunity Coordinating Council. See Title VII of the 1964 Civil Rights Act, as amended, at § 715, 42 USC § 2000e-14.

[6] See, also, "Brief of the Executive Committee of the Division of Industrial-Organizational Psychology of the American Psychological Association", in Washington v. Davis (Supreme Court No. 74-1492) wherein the EEOC's late William H. Enneis is recorded as testifying that of the three or four studies which he believed to have been conducted in compliance with the EEOC Guidelines, one cost approximately $400,000. Id. at A-33 to A-35. Mr. Enneis did not know the cost of the other studies. Id.

2. Both the EEOC Guidelines and other federal guidelines contain outdated professional standards. For example, the EEOC Guidelines contain provisions requiring that a validation experiment contain the erroneous concepts of "differential validity" and test "fairness". See EEOC Guidelines at 29 C.F.R. § 1607.5(b)(5) and the "Brief of American Society for Personnel Administration as Amicus Curiae" (filed on or about November 20, 1975) in Washington v. Davis (Supreme Court No. 74-1492) at 11-13. Even the newer FEA Guidelines wrongly imply that a sample size of 30 persons is adequate for a statistical validation study. Compare FEA Guidelines § 12b(1), 41 Fed. Reg. 51738, 51747, 51755, with Schmidt, Hunter & Urry, "Statistical Power in Criterion-Related Validation Studies", 61 Journal of Applied Psychology 473 (1976).

3. The EEOC Guidelines are widely recognized as having been promulgated as a negotiating tool, contrary to Congressional intent. This Court has previously recognized that "The EEOC Guidelines are not 'administrative regulations' promulgated pursuant to formal procedures established by the

Congress." Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975). Further, the EEOC Guidelines were adopted in the face of legislative history which demonstrated that the EEOC was not to have power generally attributed to quasi-legislative or quasi-judicial agencies (110 Cong. Rec. 2715 (1964)), and specific legislation granting the EEOC only the authority to promulgate procedural regulations. Title VII of the 1964 Civil Rights Act § 713, 42 USC § 2000e-12a. In fact, the EEOC Guidelines were originally developed to give that agency negotiating leverage in reaching conciliation agreements with employers using personnel tests. A. Blumrosen, "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination", 71 Mich. L.R. 59, 59-60 (November 1972). See, generally, A. Blumrosen, "Administrative Creativity: The First Year of the Equal Employment Opportunity Commission" 38 Geo. Wash. L.R. 695 (May 1970).

It is not surprising that the attempt by various federal agencies to create legal interpretations of a developing

professional field has resulted in standards which are not responsive to scientific advances or to the needs of employers. While such standards would be difficult to follow merely because of the great diversity of personnel tests, that task becomes impossible when those standards are technically and dogmatically interpreted by courts and compliance agencies.7/

Such guidelines, when strictly interpreted simply cannot be responsive to innovations or advances in the disciplines associated with personnel testing. For example, as Amici stated on

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7/ For an example of an improper technical use of guidelines, compare APA standards at 8 (which cautions that those professional standards are "not written as law", but "are statements of ideals or goals") with League of Latin American Citizens v. City of Santa Ana, 410 F.Supp. 873, 903-906 (C.D. Cal. 1976) (in which the Honorable Warren J. Ferguson, District Judge, found the use of a "validated" written test to be violative of Title VII on the basis of noncompliance with certain guidelines and professional standards).

p. 13-14, supra, the experimentalists' approach to "validation" is based on a single statistical theory. However, a number of statistical theorists have begun to advocate "Bayesian statistics", which extends the classical statistical model to encompass other steps in the investigator's reasoning. See L. Crombach and G. Gleser, Psychological Tests and Personnel Decisions, supra, at 153-55. Because that new approach calls for the investigator to look beyond his or her own study for evidence of test validity, it is more in accord with traditional legal analysis than is the standard experimentalist approach. Cf. Rules 401 & 402, Federal Rules of Evidence. Further, the Bayesian approach is becoming increasingly credible for the analysis of personnel tests. See Schmidt & Hunter, "Development of a General Solution to the Problem of Validity Generalization", 62 Journal of Applied Psychology 529, 530-31 (1977). However, the innovative Bayesian approach will surely fail to satisfy the proponents of a strict interpretation of various "guidelines".

The Amici urge the Court to be conscious of the risks which arise when professional standards in the developing field are characterized by litigating agencies, one of which is the inability of guidelines to accommodate changes in the state of the art. However, the more serious risk to the thrust of Title VII, the risk of the abandonment of objective standards of employment in favor of quotas based upon population parity, is discussed in the following subsection of the brief.

B. Further "Deference" to Federal Compliance Agency Guidelines Will Result in the Use of Those Guidelines to Attain Population Parity in Employment.

The Amici have observed that "deference" to the "guidelines" of federal compliance agencies leads to a technical interpretation of those guidelines in an attempt to enforce an administrative policy of numerical population parity with general population statistics in employment decisions. Such beaucratic pressure and the resulting movement of employers toward the use of numerical quotas, has been foreseen by members of this Court.

Specifically, the prediction of Mr. Justice Blackmun, concurring in Albemarle Paper Co. v. Moody, 422 U.S. 405, 449 (1975), has come to fruition. In that opinion, Mr. Justice Blackmun stated,

> I fear that a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. [Id.]

During the following year, Mr. David Rose, the Justice Department's staff representative to the Equal Employment Opportunity Coordinating Council, wrote a "Memorandum for the Deputy Attorney General, Re: Selection Guidelines" (April 12, 1976). That memorandum pertained to the failure of the Council to agree on uniform guidelines, pursuant to its congressional mandate. Mr. Rose, in explaining the EEOC's possible motive in failing to reach agreement on such guidelines, stated that

> the thrust of the present guidelines is to place almost all test users in a posture of noncompliance; to give great discretion to enforcement personnel to determine who

> should be prosecuted; and to set aside objective selection procedures in favor of numerical hiring. [Id. at p. 5. That memorandum has been published in the Bureau of National Affairs' Daily Labor Report, No. 121, pp. AA-2 et seq. (June 22, 1976).]

Thus, the Amici submit that the effect of the EEOC Guidelines has been to administratively implement the concept of racial parity in employment through the use of quotas. "This, of course, is far from the intent of Title VII." Albemarle Paper Co. v. Moody, 422 U.S. 402, 449 (Blackmun, J., concurring).

To illustrate the problem confronting municipal employers attempting to effectuate merit principles through personnel testing, the Amici respectfully ask the Court to consider the experience of the City of Los Angeles as a case study. In its Complaint charging employment discrimination in the Los Angeles Police Department, the Government has alleged, inter alia, that Los Angeles has implemented a policy of discrimination

> by utilizing written entry level examinations and other qualifications and selection standards [having adverse impact] . . . in spite of the fact that such qualifications, tests, and selection standards have not been shown to be required by business necessity, and have not been properly validated as being predictive of successful job performance. ["Original Complaint" (filed June 2, 1977) in U.S. v. City of Los Angeles (U.S. District Court, Central District of California, Civil Action No. 77-1986 JWC) at ¶ 11c.]

Thus, in the experience of the Amici, the focus of compliance activity has become technical compliance with the experimental process of "validation", rather than an evidentiary evaluation of the job-relatedness of selection requirements.

As noted above, the motive behind that focus appears to be the administrative desire to enforce the objective of numerical parity in employment. As the Assistant Attorney General, Civil Rights Division, stated shortly following the filing of the Government's Complaint against Los Angeles,

> Our suit against the Los Angeles police department was based in part on a referral from LEAA after it had failed to meet grant requirements to increase minority and female percentages. [U.S. Dept. of Justice, Remarks of Drew S. Days, III . . . before the National Black Policemen's Association . . . on August 25, 1977 at p.6.]

Compare Omnibus Crime Control and Safe Streets Act of 1968 § 518(b), 42 U.S.C. § 3766(b).

The Los Angeles experience is not unique among employers. As the result of similar experiences, this Court is beginning to see the impact of the administrative pressures brought to bear against employers in an attempt to enforce the use of racial parity in employment. See, e.g., Waters v. Furnco Construction Corp., 551 F.2d 1085 (7th Cir. 1977) (U.S. Supreme Court No. 77-369); Weber v. Kaiser Aluminum & Chemical Corp. 563 F.2d 216 (5th Cir. 1977). Those pressures have become so pervasive that one academician has opined, "That all this is still called 'equal employment opportunity' is simply another example of the misnaming of reality in an age in which words are easily distorted into their

opposites." N. Glazer, Affirmative Discrimination: Ethnic Inequality and Public Policy 49 (1975).

From the prospective of the Amici, this Court's adoption or endorsement of provisions of any federal "guidelines" or professional "standards" will result in increased administrative pressure on municipal employers to achieve numerical parity with general population statistics in employment. Therefore, the Amici submit that any "deference" granted to such standards in the context of this case will undercut the "unambiguous" focus of Title VII: That persons must be treated as "individuals", rather than "as simply components of a racial, religious, sexual, or national class." City of Los Angeles, Dept. of Water and Power v. Manhart, ____ U.S. ____, 98 S.Ct. 1370, 1375 (1978).

C. A Positive Solution to the Problem of Test Confidentiality: Recognition of the Need for Tests to Remain Confidential Because of the Potential Impact of Test Disclosure Upon Test Validity and Reliability.

The Amici neither ask nor expect the Court to make positive statements regarding the legal effect of various federal guidelines, or the abuse of those guidelines by federal compliance agencies. Rather, those municipal employers request the Court to avoid language in an opinion upholding the Employer which could be interpreted to be supportive of federal guidelines.

Therefore, the Amici urge this Court to uphold the confidentiality of test material by holding that test disclosure would result in making a test useless as a predictor of job performance. In so holding, the Amici ask that any mention of the concept of "job-relatedness" be consistent with "the much more sensible construction of the job-relatedness requirement" interpreted in Washington v. Davis, 426 U.S. at 251.

Further, if various federal compliance agency guidelines are discussed at all, the Amici request that such discussion parallel the language of General Electric Co. v. Gilbert, ____ U.S. ____, 97 S.Ct. 401, 411 (1976), in which the Court found that the EEOC Guidelines were entitled to "consideration in determining legislative intent . . . ."

III

IN THE EVENT THIS COURT SHOULD UPHOLD THE LOWER COURT DECISION, THE AMICI ASK THAT COURTS REVIEWING SIMILAR MATTERS IN THE FUTURE BE CAUTIONED THAT THE BALANCING OF EMPLOYER AND UNION INTERESTS SHOULD BE ON A CASE-BY-CASE BASIS

In the event that this Court decided to uphold the lower court decision, the Amici ask the Court to recognize that a "balancing of interests" in a test disclosure case may require a different decision depending upon such factors as the potential costs of employee error and training, and an employer's need to objectively distinguish between large numbers of applicants.

For cities, personnel testing grew directly from the implementation of merit systems to avoid the granting of jobs and compensation as "spoils" of a political victory. Prior to the implementation of such merit systems "[p]ositions were created at public expense to serve as rewards for party workers, and salaries were often adjusted not to the value of the public services performed but to the value of the employee's party service." W. Anderson & E. Weidner, American City Government 504 (Revised ed. 1950).

Like the civil rights movement, merit systems did not come into vogue overnight. In fact, the movement toward a federal merit system began only after the death of President Garfield at the hands of a disappointed officeseeker in the late 19th Century. See M. Schinagl, History of Efficiency Ratings in the Federal Government 18 (1966). Gradually, the concept of appointing individuals to public office on the basis of merit principles moved through the federal level, and was implemented by local governments. By 1949, merit systems were in general use in larger

cities. See W. Anderson & E. Weidner, American City Government, supra, at 505. Although we now tend to take little notice of the charter provisions providing for merit appointments in the context of other litigation, such laws are essential to the fair and effective administration of city government. Civil service laws, like the laws protecting the rights of unions, "were enacted to ameliorate a social evil." Cf.Kirkland v. New York State Dept. of Correctional Services, 520 F.2d 420, 428 (2d Cir. 1975).

Therefore, the Amici urge that any decision upholding the lower court in this case be accompanied by a caveat that the decision reached need not have been the same given different policy considerations, such as an employer's need to administer personnel tests to uphold merit principles.

CONCLUSION

In Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971), this Court wrote that rather than "disparaging job qualifications", Congress in Title VII of the 1964 Civil Rights Act "has made such qualifications

the controlling factor, so that race, religion, nationality, and sex become irrelevant." The Amici submit that the use of objective, job-related personnel tests are an important tool in promoting the irrelevancy of those forbidden characteristics, and that the ultimate goal of Title VII will be furthered if this Court chooses to uphold the necessary confidentiality of personnel tests. These Amici also ask this Court to articulate that holding in a way which will not enable litigating administrative agencies the opportunity to utilize the strict interpretation of various guidelines to impede that goal.

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IN THE

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OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE SUBMITTED BY THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER'S BRIEF

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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States is the largest business federation in the United States, with a total membership in excess of 74,000 enterprises and organizations representing businessmen and women throughout the United States. More than 3,700 state and local Chambers of Commerce and trade associations are members.

The case *sub judice* is of vital concern to the large number of Chamber members who rely upon testing in selecting or promoting employees — a reliance which

enables employers not only to fulfill their obligations under Title VII of the Civil Rights Act of 1964 to ensure an objective selection process, but also to minimize the risk of selecting unqualified personnel to perform jobs vital to an employer's operations.

The value of testing as an objective employee selection device in American industry and government has been confirmed by several comprehensive studies, including surveys conducted by the Personnel Policies Forum in September, 1976 (PPF Survey 114, p. 1 (BNA, 1976)) and by the United States Civil Service Commission [1] in December, 1977. The decision below, if allowed to stand, will pose significant, if not insuperable, obstacles to the continuation of the extensive testing program of Chamber members.

QUESTION PRESENTED

Whether the Company violated Section 8(a) (5) and (1) of the Act by refusing to supply the Union with copies of an aptitude test battery, the applicants' test papers, and employee-linked test scores.

STATEMENT OF FACTS

The Detroit Edison Company ("the Company") is a public utility engaged in the generation and distribution of electric power in the State of Michigan. Since approximately 1943, the Union [2] has represented various employees of the Company in approximately 28 bargaining units, including a unit composed of operating and maintenance employees in the production department of the Company's Monroe power plant (P.A. 19a).[3] Since its certification in the Monroe unit on April 1, 1971, the Union has entered into two successive collective bargaining agreements covering the operating and maintenance employees, the second of which was executed on July 3, 1972 (P.A. 20a).

In late 1971, the Company determined to fill six unit positions in the Instrument Man B classiffication — a job whose duties include the maintenance of instrumentation vital to the plant's operation. Among the posted requirements for the Instrument Man B position was a minimum of "recommended" on a battery of aptitude tests administered by Company-employed psychologists (P.A. 20a).[4] The ten Monroe employees who bid for the position were rejected [5] because they failed to achieve a "recommended" score on a test battery which was first developed by the Company in 1958, "refined" in 1969-1970, and twice validated by the Company's industrial psychologists (P.A. 21a; A. 75-78, 178-179.[6]

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[1] Status of Test Usage in FY 77, Technical Note 77-2, Test Services Section, Personnel Research and Development Center, United States Civil Service Commission (Dec. 1977).

[2] Local 223, Utility Workers Union of America, AFL-CIO (hereafter, "the Union").

[3] "P.A. references are to the Appendix to the Petition for Certiorari; A" references are to the Appendix that was prepared after the petition was granted.

[4] The other listed qualifications included high school credits for two years of mathematics and one year of science and a satisfactory physical examination and attendance record. The only selection standard challenged by the Union was the aptitude test.

[5] Five of the six positions were filled by the five most senior applicants who did achieve a "recommended" score; the sixth position was taken by an incumbent Instrument Man from another location.

[6] The Instrument Man test battery was revalidated in 1969-1970 at the suggestion of the technical engineers of the Company's power plants. In 1972 the battery was reviewed by an outside consultant, the National Compliance Company ("NCC"), in conjunction with its revalidation studies of 15 additional job test batteries utilized by the Company. It should be specifically noted that the validity of the test is not in question (A.92-93, 100, 344).

On January 17, 1972, the Union filed a grievance under the collective bargaining agreement protesting the Company's reliance upon the test results to deny the Monroe bidders promotion to Industrial Man B (A. 120).[7] While denying the grievance, the Company offered to confer with the Union "to enhance their understanding of the Company's objectives in the testing area" — an offer which the Union rejected as "completely unacceptable" (A. 153, 154). Accordingly, the Union requested arbitration of the grievance on October 27, 1972 (A. 154).

Thereafter, on March 5, 1973,[8] the Union requested for the first time the following information: (1) the actual battery of tests; (2) the method of scoring and the criteria for establishing the "cut-off" score of 10.3; (3) a report on the test validation; and (4) the report of the National Compliance Company (A. 121). In response to the Union's request, the Company arranged a meeting on April 2 to explain to the Union the entire testing program (A. 26-27, 122). At the April 2 meeting, the Company furnished the Union with the validation studies for the Instrument Man B test battery conducted by both the Company's psychologists and the NCC (P.A. 31a; A. 13-14, 343-378). The Company declined, however, to provide the Union the test batteries, the actual test papers or the actual test scores of the applicants, as a consequence of which the Union, on April 4, filed with the National Labor Relations Board ("NLRB" or "Board") an unfair labor practice charge, alleging that the refusal to provide the requested information violated the Company's duty to bargain in good faith (Section 8(a) (5)) (A. 104-106).

While the charge was pending before the NLRB, hearings were conducted before Arbitrator Jones on May 23, 24, 30 and 31 (A. 110). At the outset of the May 23 hearing, the Union requested that the Arbitrator require the Company to supply copies of the test (A. 14, 123-124). During the hearing, the Company supplied the following information:

1. Its 1970 validation study.
2. The 1972 NCC report.
3. Explanations of the tests utilized.
4. Representative sample questions.

Also during the hearings, the Company offered to administer the test battery to the Union's representative and to disclose the test scores of employees who did not object to their release — an offer rejected by the Union (A. 6-7, 44). Finally, the Company revealed the examinees' test scores without linking them to the applicants' names (A. 279-280).

After the close of the original arbitration hearings, the Union — notwithstanding the extensive information provided or offered by the Company — reiterated on June 2 its request for "the actual tests, scores and weights" (A. 125-126). By letter dated July 10, the Company, while again declining to furnish either the actual test battery or scores linked to individual names, responded affirmatively and in detail to the Union's request concerning the battery weights and scoring mechanisms (A. 127-131). On July 23, Arbitrator Jones ruled that he was not authorized under the contract to compel the Company to furnish the information, although he invited the Union to produce case citations for the contrary proposition — an invitation declined by the Union (P.A. 67a). Four days later the Union and Company agreed that the Arbitrator should decide the merits of the grievance without the requested information, subject to the Union's right to reopen the

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[7] The collective bargaining agreement requires that promotion be based on seniority "whenever reasonable qualifications and abilities of the employees being considered are not significantly different...."

[8] All dates hereafter refer to "1973," unless otherwise indicated.

arbitration proceeding "if the Company ever in fact is ordered to . . . disclose the actual tests as a result of a final court order". . . (A. 138-139). Accordingly, on December 3, the Arbitrator ruled that the Company did not violate the collective bargaining agreement by establishing an acceptable score on the test battery as a qualification for the Instrument Man B position, but directed the Company to re-examine the three employees with scores between 9.3 and 10.3 (P.A. 76a).[9] In so ruling, the Arbitrator underscored that the actual test questions "prove nothing" and that the "union's position was [not] damaged in any way by lack of access to the test" (P.A. 72a).

PROCEEDINGS BELOW

On the basis of the foregoing, the Board concluded that the Company's failure to furnish the Union with the requested information violated Section 8(a) (5) and (1) of the National Labor Relations Act ("the Act"). As remedy therefor, the Board (Member Kennedy, dissenting) ordered the Company to supply the Union with copies of the test battery, the applicants' test papers, and the applicants' test scores linked to individual names. In so ordering, the Board majority rejected the Administrative Law Judge's recommendation that the Company be required to deliver copies of the test battery, including the applicants' actual test papers, only to a "qualified psychologist" selected by the Union (P.A. 14a-17a).

The Sixth Circuit (Circuit Judge Weick, dissenting) enforced the Board's order, rejecting the Company's contentions that disclosure to the Union could destroy the utility of the tests, require the Company's industrial psychologists to breach their professional ethical code, and invade the privacy of the employees whose test scores the

[9] Upon re-examination, one employee was promoted to the Instrument Man job; two were again rejected (P.A. 39a).

Company is also required to divulge (P.A. 1a-12a). Subsequently, on November 22, 1977, the Sixth Circuit denied a petition for rehearing filed by the Company. On January 4, 1978, the Company filed a Petition for a Writ of Certiorari which this Court granted on March 27, 1978.

SUMMARY OF ARGUMENT

Under Section 8(a) (5) of the Act, the employer is obligated to furnish the union information "relevant" or "necessary" to the performance of its statutory duties *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). A failure to supply even relevant information does not, however, constitute a *per se* refusal to bargain in good faith. *NLRB v. Truitt*, 351 U.S. 149 (1956). Instead, in determining whether the employer's non-disclosure is in good faith, the NLRB is required to consider the "circumstances of the particular case" and to balance the conflicting interests at stake. *NLRB v. Truitt, supra*, 351 U.S. at 153-154. The NLRB and court below admittedly considered only the interests of the Union, disregarding (1) the Company's interest in its testing program; (2) the psychologists' interest in maintaining the ethical standards of their profession; and (3) the examinees' interest in privacy.

Test security — and the consequent utility of tests under Title VII of the Civil Rights Act — is jeopardized by the Board's disclosure requirement. Thus, the NLRB's restriction against unauthorized dissemination of the test battery [10] cannot be enforced in view of the impracticality of policing compliance therewith and the unavailability of a contempt sanction. In any event, even if the Union were adjudged in contempt for a violation of the "restriction," the Company is denied an adequate remedy since the tests

[10] The "restriction" is limited to the test battery itself; accordingly, the Union is not even arguably constrained from disseminating the actual test papers and employee scores.

will have been invalidated and revalidation of a test battery — apart from its cost — requires years and could again be defeated by a recalcitrant or "negligent" union official.

ARGUMENT

THE BOARD ERRONEOUSLY CONCLUDED THAT THE COMPANY'S FAILURE TO SUPPLY THE REQUESTED TEST MATERIALS VIOLATED SECTION 8(a) (5) AND (1) OF THE ACT

A. Section 8(a) (5) Of The Act Does Not Require Disclosure Of Information That Is Not Even "Probably Relevant" To The Union's Administration Of The Contract

In *NLRB v. Acme Industrial Co., supra,* this Court reaffirmed the employer's obligation under Section 8(a) (5) of the Act to provide the union information that is "probably" relevant to the discharge of its statutory responsibilities. *Acme,* we submit, establishes a rule of presumptive relevance of requested wage and related information; however, if the employer effectively rebuts the presumption, the burden shifts to the union to demonstrate relevance. *Emeryville Research Center, Shell Div. Co. v. NLRB,* 441 F.2d 880, 885 (9th Cir. 1971). Compare *Kroger Co. v. NLRB,* 399 F.2d 455, 459 (6th Cir. 1968).

The presumptive relevance of the desired test materials was rebutted by *uncontradicted* testimony that the *only* information necessary to determine the validity of the battery is the 1970 and 1972 validation studies that were provided at the April 2, 1973 meeting (A. 50-51, 71-72, 79-80, 191). Accordingly, disclosure of the battery itself is superfluous — a view obviously shared by the Arbitrator:

> The Union questioned the validity of the test by reference to the type of question asked. It was to further this line of questioning that the Union desired a copy of the test. But this was simply a questioning

> of the face validity of the test. Such questions, even if taken from the test itself, prove nothing. Face validity does not prove or disprove the validity of the test in determining the aptitudes necessary for successful job performance . . . In short, the Arbitrator does not believe that the Union's position was damaged in any way by lack of access to the test (P.A. 72a).

In light of the Company's effective rebuttal, the Union was not entitled under *Acme* to rely on a vague avowal of relevance to establish its right to the information:

> . . . [The tests] are an entirely new dimension. It was a new hurdle over which the employees had to jump before they'd even get consideration . . . I would see the relevance of the tests to the job. Obviously if there was Einstein's theory in there I would say that was an unfair test or things like that (A. 24).

In its opposition to the petition for certiorari, the Board apparently contends (Br. 7-8) that the Company's failure to except to the Administrative Law Judge's disclosure order constituted a tacit admission of the "probable" relevance of the test materials. However, the Law Judge required the Company merely to submit the test battery to a qualified psychologist retained by the Union — a proposal that the Company voluntarily advanced at the outset of the unfair labor practice hearing and, accordingly, would have no reason to challenge before the Board. Conversely, the *Board's* refusal to adopt the Law Judge's recommended order "revived" the exception and adequately preserved the point for judicial review. Compare *NLRB v. Ochoa Fertilizer Corp.,* 368 U.S. 318, 322 (1961).

In any event, the Board seeks to justify its disclosure requirement on the ground that the information may enable the Union to learn "whether the tests are truly job related or contain objectionable distortions . . ., whether they have built-in bias and are, in fact, discriminatory . . ." (P.A.

47a; Bd. Br. 7, n. 7). The Board, however, overlooks the essential, undisputed point that a valid and reliable test battery, by definition, will contain neither "distortions" nor "built-in bias." Indeed, the Board concedes (P.A. 47a; Br. 7, n. 7) that the statistics offered by the Company "tend to show that the tests are valid to serve *the employer's purpose;* i.e., they may serve to identify those employees likely to do well on the job" (emphasis in original). We submit that the Board's concession forecloses an argument before the Arbitrator that the tests are "discriminatory" or contain "objectionable distortions;" if the battery reliably predicts which employees will competently perform the vital duties of an Instrument Man B, the Arbitrator's inquiry is at an end.[11]

B. Disclosure of The Requested Information—Even If "Probably" Relevant Within The Purview Of Acme—Was Not Warranted Under NLRB v. Truitt

1. Introduction

In *NLRB v. Truitt, supra,* this Court, while concluding that an employer violated Section 8(a) (5) by declining to produce requested financial data to substantiate a claimed inability to afford a wage increase, cautioned:

> We do not hold . . . that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts [footnote omitted]. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met (351 U.S. at 153-154).

[11] In its opposition to the petition, the Board maintains (Br. 7, n.7) that the Arbitrator "reserved the right of the Union to reopen the arbitration case if it obtained the materials through court order" — a point which the Board evidently raises to bolster its claim that the materials requested by the Union are, in fact, relevant. As a threshold difficulty, the Arbitrator did not *sua sponte* reserve the Union's right to reopen; he merely sanctioned an agreement of the parties (*supra, pp. 5-6.*) In any event, the Arbitrator did not indicate that his resolution of the contract issues was impeded by the unavailability of the materials requested by the Union. Accordingly, the Arbitrator would not reach a different result if the requested materials were before him — a circumstance which underscores the futility of the proposed disclosure.

As underscored by the dissenting Justices, the Board in *Truitt* had applied a wrong standard in ruling that the employer's failure to supply the requested financial information constituted a *per se* refusal to bargain in good faith. Subsequently, this Court confirmed that under *Truitt* a refusal to supply information is merely *evidence* of bad faith. *NLRB v. Insurance Agents' Int'l Union,* 361 U.S. 477, 487 (1960). See also *Shell Oil Company v. NLRB,* 456 F.2d 615, 618 (9th Cir. 1972). ("The Board asserts that once information is shown to be relevant to the Union's performance of its role as bargaining representative, this fixes the duty of the Company to produce and any failure to produce is *per se* an unlawful refusal to bargain. However, this is not the law."); *Kroger Co. v. NLRB, supra,* 399 F.2d at 456, 458 (*Truitt* requires consideration of the "circumstances of the particular case" and a balance of the "conflicting" interests at stake). See, generally, Fanning, *The Obligation to Furnish Information During The Contract Term,* 9 Ga. L. Rev. 375, 376 (1975). ("It is important to note that the [*Truitt*] Court was not making a *per se* finding").[12]

Initially, the Company's good faith should be evaluated in light of the "wealth of material" the Company did supply the Union (*supra, p.5*) — material which was "sufficient

[12] *NLRB v. Acme Industrial Company, supra,* 385 U.S. at 435-36, confirmed the employer's obligation to furnish the union information "necessary" to the performance of its statutory responsibilities, but did not disturb *Truitt's* rejection of a *per se* analysis of the "good faith" issue.

to permit the union to . . . perform its duties under the collective bargaining agreement" (P.A. 11a). In any event, the NLRB and court below — contrary to *Truitt* — failed either to consider the "circumstances of the particular case" or to balance the conflicting interests at stake. Indeed, the Company's violation of Section 8(a) (5) flowed automatically from the determination that the requested information was arguably "of value to the Union in fulfilling its responsibility to the employees" (P.A. 15a). The competing interests disregarded below included: (1) the Company's interest in its testing program; (2) the psychologists' interest in maintaining the ethical standards of their profession; and (3) the examinees' interest in privacy.

2. The Board's Restriction Does Not Protect The Company's Interest In Its Testing Program

In response to the Company's argument that unauthorized disclosure would invalidate the aptitude tests, the Board, with the approval of the court below, merely "restricted" the *Union* from disclosing their contents to employees — a restriction which dissenting Judge Weick termed "really naive" and which, in addition, conflicts with *Kirkland v. Department of Correctional Services*, 520 F.2d 420 (2nd Cir. 1975). (Nothing in Title VII requires or authorizes an "advance review" by minority applicants of the examination for the position to which they seek promotion.) [13] A threshold difficulty with a mere "restriction" is that nothing in the Board's court-enforced *order* requires the Union not to publicize the tests or their results; accordingly, the availability of a contempt sanction, we

[13] The Board seeks (Br. 8, n.8) to distinguish *Kirkland* on the ground that the order reviewed by the Second Circuit required disclosure to "potential test-takers." The Board evidently misses the fundamental point discussed in detail below: disclosure to the *Union*, rather than to a qualified psychologist, similarly risks "foreknowledge" of the examination by potential examinees and the consequent invalidation of the battery.

submit, is at best speculative.[14] Indeed, even assuming the Board's willingness to initiate contempt proceedings against the Union,[15] the Court, we submit, lacks jurisdiction to enter a contempt judgment against a nonparty "whose rights have not been adjudged according to law" *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945); *Chase Nat. Bank v. Norrwalk*, 291 U.S. 431, 436 (1934);

[14] A similar view was recently expressed by a commentator:

> The Court thought it could accomodate Detroit Edison's concerns by restricting the union's right to use the tests and by forbidding disclosure, but the restrictions are likely to be no more effective than the available sanctions. The general remedy for violation of a court-enforced Board order is to find the violator in civil contempt [footnote omitted], but where, as in *Detroit Edison*, the union does not intervene in the enforcement proceeding, the contempt sanction may be unavailable [footnote omitted]. Note *Psychological Aptitude Tests and the Duty to Supply Information: NLRB v. Detroit Edison Co.*, 91 Harvard Law Review 869, 875 (1978) (hereafter cited "Employee Test Disclosure").

The Board's contrary view (Br. 9-10, n.11) is based upon the proposition — for which the Board cites no authority — that the Union's acceptance of the requested materials subjects it to contempt proceedings for violation of the accompanying restrictions. However, the Board's "benefit-burden" theory does not invariably apply to a "third party beneficiary" of a court judgment entered in a proceeding to which it was not party.

[15] *Amalgamated Utility Wkrs. v. Consolidated Edison Co.*, 309 U.S. 261, 264 (1940), establishes that the Board has exclusive standing to institute contempt proceedings for failure to comply with a court-enforced Board order. Moreover, the institution of contempt proceedings, although dependent upon formal authorization by the Board, may be "short-circuited" by the General Counsel to whom the Board has delegated the discretionary authority to determine whether or not to seek contempt. See, generally, Bartosic and Lanoff, *Escalating the Struggle Against Taft-Hartley Contemnors*, 39 University of Chicago L.Rev. 225, 259-261 (1972). In any event, the Board itself has displayed a reluctance to pursue vigorously the contempt remedy. Bartosic and Lanoff, supra, at pp. 256-257. In light of the Board's contempt record, the Company can scarcely anticipate that the Board will authorize — or, indeed, that the General Counsel will even seek — contempt against a party which neither committed an unfair labor practice nor was otherwise on notice that its legal relationships were being adjudicated.

Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2nd Cir. 1930).[16] Moreover, as the authority cited by the Board (Br. 9-10, n. 11) recognizes, a contempt remedy is available only in the event of a *wilful* violation of the restriction; accordingly, *inadvertent* disclosure by the Union[17] poses a very substantial threat to test security undiminished by the "deterrence" of a contempt sanction. In any event, contrary to the Board (Br. 8-9), the assumption that the Union may intentionally violate the court-imposed restrictions is *not* unsupported; indeed, the record discloses the Union's hostility to a testing program which, in its view, threatens "seniority" as a primary determinant of employment conditions (A. 160-169).[18] Finally, even if the union were adjudged in contempt for a violation of the "restriction," the Company is denied an adequate remedy since the tests will have been invalidated and revalidation of a test battery requires years and could again be defeated by a recalcitrant or "negligent" union official.

In its opposition to the petition, the Board attempts to

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[16] In *Alemite* the court had enjoined Staff's employer from infringing Alemite's patent; after the injunction issued, Staff severed his relationship with his former employer and infringed the patent. In maintaining that Staff was not in contempt of the injunction issued against his former employer, the Second Circuit noted that "it is not the act described which the decree may forbid, but only that act when the defendent does it" (42 F.2d at 833). By the same token, even if the Union could be "enjoined," the injunction would not bind a former official, who could publicize the tests with impunity. *Harvey v. Bettis*, 35 F.2d 349, 350 (9th Cir. 1929).

[17] Even apart from ethical and professional constraints, qualified psychologists are in a far stronger position by virtue of their training and experience to prevent inadvertent dissemination of test materials.

[18] As the Harvard commentator observed:

> . . . [F]ears about dissemination are even more understandable when one recognizes that unions dislike testing because it modifies their seniority systems [footnote omitted]. If dissemination makes it more difficult for the company to use tests, the union may have little incentive to guard their confidentiality. *Employee Test Disclosure, supra*, 91 Harv. L. Rev. at 875.

rationalize rejection of the Law Judge's recommendation that the test battery be submitted only to a Union-retained psychologist:

> The Board decided to leave to the Union the decision whether it needed a psychologist to aid it in analyzing and interpreting the test materials [citation omitted]. Since the services of a professional psychologist are costly, the Board was reasonable in not requiring the Union to incur this expense unless it believed it was necessary for the intelligent processing of the grievance (Br. 8-9, n. 9).

However, the *uncontradicted* evidence (A. 77-78) supports the Law Judge's finding that the Union will require professional assistance to analyze the test materials.[19] Accordingly, the Union's only "decision" is whether to retain a psychologist or forego intelligent interpretation of the data.[20] By the same token, the expense will *necessarily* be incurred if the Union is interested in an analysis of the test materials. In any event, nothing in the Board's decision indicates that cost considerations underlie its order and under well settled rules of administrative law, the propriety of the Board's action must be judged solely on the grounds invoked by the agency — not by counsel's *post hoc* rationalizations. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *FPC v. United Gas Pipeline Co.*, 393 U.S. 71 (1968).

Apart from its "reasonableness," the Board's restriction

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[19] As Judge Weick underscored:

> The furnishing of all the papers requested by the union would have required the assistance of a psychologist, but the union declined to accept such offer. These papers simply could not have been evaluated by a lay person (P.A. 11a).

[20] Significantly, the Union did not seek a "formal" psychological evaluation of the "wealth of material" (P.A. 9a) that the Company did supply — a circumstance which casts doubt on the *bona fides* of its request (A. 45).

is obviously not calculated to prevent unauthorized dissemination of the test battery. Thus, "the Union" to which the Board and Sixth Circuit have ordered disclosure at least arguably includes not only its executive officers but also grievance committee members, shop stewards or "agents" — in short, *several* potential examinees. Moreover, the risks of unauthorized disclosure obviously increase in direct ratio to the number of individuals entitled to receive or inspect the materials. Apart from mere numbers, Union representatives untrained in industrial psychology may, as discussed above, even innocently disseminate the test materials. Under the foregoing circumstances, policing Union compliance with the Board's restriction presents formidable, if not insuperable, obstacles.

3. The Board and Sixth Circuit Disregarded the Interests of the Industrial Psychologists and Examinees

Apart from the jeopardy to the Company's testing program, the Board and court below similarly disregarded the interests of the industrial psychologists and the examinees. Thus, as dissenting Judge Weick noted, the psychologists' disclosure of the aptitude test battery constitutes a violation of their profession's Code of Ethics and exposes the psychologists to disciplinary sanction, including suspension or even revocation of their licenses. For example, the "Standards for Educational and Psychological Tests and Manuals," published by the American Psychological Association ("APA") and recognized by the EEOC testing guidelines, impose upon psychologists who administer tests a responsibility — shared with the test developer or distributor — to maintain test security. In addition, Standard J2 of the APA Standards limits disclosure of test scores to individuals "qualified to interpret them." The Comment to J2 denies "test score" access to "curious peers" — among whom, we submit, may be included the employees represented by the Union.

Finally, the employees who are examined by the Company's psychologists, and with whom they enjoy a confidential and privileged relationship, have an unquestioned interest in privacy which neither the Board nor court below evaluated. Compare *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 168 (D.D.C. 1976) ("The disclosure of information concerning an employee's promotion prospects, lack of promotion prospects, job performance evaluations, and personal preference and goals, and the reasons for an employee's termination contained in . . . [affirmative action plans] would constitute a substantial invasion of the companies' employees' personal privacy"). Accord: *Hughes Aircraft Co. v. Schlesinger*, 384 F. Supp. 292, 298 (C.D. Cal. 1974); *Westinghouse Electric Corporation v. Schlesinger*, 392 F. Supp. 1246, 1249-50 (E.D. Va. 1974), aff'd 542 F.2d 1190 (4th Cir. 1976).[21] Apart from a right of privacy granted under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, Congress has also recognized a privacy interest of students and parents under the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232(g), to prevent the release of education records, including grades, test scores or "personally identifiable"

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[21] In its opposition to the petition, the Board mistakenly relies (Br. 11, n.12) upon *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969), in rejecting the contention that its order violates privacy interests of the employees. In *Wyman-Gordon*, this Court declined to disturb the Board's balancing of interests; in the instant case, the Board admittedly did not even consider the employees' privacy interests. Moreover, the disclosure requirement in *Wyman-Gordon* served an important statutory purpose of encouraging an informed employee electorate; in the instant case, nothing is accomplished by compelling disclosure to the Union of materials that are neither relevant to its statutory responsibilities nor, in any event, intelligible without professional assistance. Finally, whatever statutory objective is arguably promoted by the Board's disclosure requirement could be achieved by a more narrowly tailored order that does not impinge upon employees' privacy interests. For example, a "coding" system could be devised that would preserve individual employees' anonymity while providing the Union the requisite statistical data.

information. See also the Rules and Regulations of the Department of Health, Education and Welfare, 45 C.F.R. §99.30. The prohibition against the release of test scores — albeit in an "education," rather than employment, context — reflects a Congressional interest in minimizing perceived invasions of privacy. Indeed, the Board, while generally rejecting a privacy or confidentiality defense to a refusal to furnish requested information,[22] has itself invoked an invasion of employee privacy to resist disclosure of the names and addresses of employees eligible to vote in NLRB elections — information requested under the FOIA by law professors engaged in a NLRB voting study. *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971). In rejecting the Board's privacy defense, the *Getman* court pointed out:

> [A]lthough a limited number of employees will suffer an invasion of privacy in losing their anonymity and in being asked over the telephone if they would be willing to be interviewed [footnote omitted] in connection with the voting study, the loss of privacy resulting from this particular disclosure should be characterized as relatively minor . . . The giving of names and addresses is a very much lower degree of disclosure; in themselves a bare name and address give no information about an individual which is embarrassing (450 F.2d at 674-675).

In contrast, the challenged disclosure of test scores of named applicants is potentially *very* "embarrassing" — an embarrassment which is obviously not justified by a misperceived benefit to the Union from disclosure of the test data.

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[22] *E.g., Aluminum Ore*, 39 NLRB 1286, 1297 (1942); *Electrical Mfg. Co.*, 173 NLRB 878, 880 (1968). Compare, however, *McCulloch Corporation*, 132 NLRB 201, 207 (1961) in which the Board, citing a potential "breach of confidence," sustained the employer's refusal to disclose in negotiations a wage survey of its competitors who had provided the wage data only upon assurances that the information would remain confidential.

C. The Board's Disclosure Requirement, Adopted By The Sixth Circuit, Defeats The Company's Right Under Title VII Of The Civil Rights Act Of 1964 To Utilize Validated Aptitude Tests

We have demonstrated above that test security will be compromised by the challenged disclosure requirement and that, as a consequence, the use of aptitude tests under Title VII of the Civil Rights Act of 1964 is jeopardized. Yet, neither the Board nor the Sixth Circuit even considered the impact of the disclosure requirement upon the extensive testing programs in the private and public sectors that are encouraged by Title VII and the implementing regulations of the EEOC.

It is well settled that the National Labor Relations Act ("NLRA" or "Act") must be construed "in light of the broad national labor policy of which it is a part" [23] — including, of course, the national commitment to eradicate employment discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Simply stated, the National Labor Relations Board cannot issue orders which have an impact on other employment legislation without carefully accommodating one scheme to another. Indeed,

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[23] *Emporium Capwell Co. v. Western Addition Commun. Org.*, 420 U.S. 50, 66 (1975). Compare *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) in which this Court cautioned the Board:

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

The NLRB itself has elsewhere acknowledged that the NLRA "cannot be administered in a vacuum. The Board must recognize the purposes and policies of other employment legislation, and construe the Act in a manner supportive of the overall statutory scheme." *Alleluia Cushion Co., Inc.*, 221 NLRB 999, 1000 (1975).

the Board must administer the Act in a manner supportive of the overall legislative program. *Southern Steamship Co. v. NLRB, supra.*

The decision below, requiring employers to grant unions access to their aptitude tests,[24] will threaten the very ability of companies to use such tests since the tests' security is critical to their usefulness. Obviously, if some individuals who ultimately will be taking the test have advance knowledge of the questions, the utility of the test will be destroyed. "The obvious security problem is to avoid having applicants know the test questions in advance. To maintain security, tests not in use should be kept under lock and key . . . Test security also implies a necessity for keeping tests out of the hands of people who are not competent to use them properly." [25]

The latter point is, of course, a critical issue in this case. Rather than order the tests to be delivered to an industrial psychologist chosen by the Union, the Board ordered that the test materials be given to the Union itself. While a psychologist is under professional and ethical obligations not to reveal the tests to non-experts, there is no practical constraint on the union's disclosure. Moreover, as noted above, the availability of a contempt sanction against the Union — viewed most charitably to the Board's position — is at best "speculative." Under the Board's decision, then, Detroit Edison will have no reasonable assurance that the tests' security will long be maintained — a cicrumstance which leaves the Company little choice but to abandon the use of tests altogether, thus thwarting its efforts to develop

[24] In addition, if carried to its logical conclusion, the Sixth Circuit result may also compel employers to disclose to unions supervisory evaluations, hiring interview reports or srimilar documents which may be considered "tests" under the Equal Employment Opportunity Commission, *Guidelines on Employee Selection Procedures.* 29 C.F.R. §1607.

[25] Guion, R.M., *Personnel Testing,* 1965, p. 504.

objective, nondiscriminatory selection standards which conform to the requirements of Title VII.

Accordingly, in defining the scope of the employer's obligation under Section 8(a) (5) of the Act to furnish information that may assist the union in performing its representative functions, the Board must consider the potential impact of its orders upon implementation of the Congressionally-mandated equality of employment opportunity — a goal which is facilitated by reliance upon properly validated and administered aptitude or ability tests. See, *e.g.,* Section 703(h) of Title VII of the Civil Rights Act,[26] Equal Employment Opportunity Commission ("EEOC") *Guidelines on Employee Selection Procedures,* 29 C.F.R. §1607.1(a) (". . . [P]roperly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies . . . in the development and maintenance of an efficient work force and . . . the utilization and conservation of human resources generally").

[26] Section 703(h), which expressly authorizes an employer to administer and "act upon the results" of nondiscriminatory, professionally developed ability tests, was a response to *Myart v. Motorola, Inc.* (reproduced in its entirety at 110 Cong. Rec. 5662-64 (March 19, 1964), a decision by a hearing officer of the Illinois Fair Employment Practices Commission which, in the view of proponents of 703(h), jeopardized the continuance of employer testing programs:

> . . . [Myart] is highly unreasonable, because if Title VII were administered in this fashion, it would mean that an employer would be denied the means of determining the trainability and competence of a prospective employee, or the competence of one who is currently employed and who is being considered for promotion. (Remarks of Senator Tower (R. Tex.) at 110 Cong. Rec. 13, 492 (June 11, 1964)).

See also the exchange between Senators Fulbright (D. Ark.) and Ellender (D. La.), printed at 110 Cong. Rec. 9599-9600 (April 29, 1964). In short, the legislative history of Section 703(h) discloses a vital interest in protecting employer reliance upon properly validated tests in determining employment conditions.

See also *Griggs v. Duke Power Co., supra,* 401 U.S. at 433-34; *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 430-31 (1975) (EEOC testing guidelines are entitled to "great deference").

Even a cursory analysis of the decisions below reflects a failure to accommodate the policies of the NLRA and Title VII. Thus, Section 8(a) (5) has never previously been construed to require an employer to disclose to unions aptitude tests or test scores achieved by named applicants. In fact, the General Counsel, citing the impact of a disclosure requirement upon the utility of tests, previously refused even to issue a complaint. *International Telephone and Telegraph, Federal Division,* 22-CA-499, 46 LRRM 1387 (1960). Nor is the Board's construction of Section 8 (a) (5) required or even contemplated by *NLRB v. Truitt Mfg. Co., supra,* which, as detailed above (pp. 10-12), defines the appropriate inquiry of the NLRB under the "good faith" requirement of Section 8(a) (5) in evaluating an employer's refusal to provide requested information. Moreover, as noted above, the significance under Title VII of properly validated and administered tests as a nondiscriminatory, objective determinant of employment conditions can scarcely be disputed. Compare *Albermarle Paper Co. v. Moody, supra,* 422 U.S. at 432-433; *Senter v. General Motors Corporation,* 532 F.2d 511, 529 (6th Cir. 1976), *cert. denied,* 429 U.S. 870 (1976), and cases cited at n. 56. Thus, the NLRB should have weighed the importance of employer compliance with the EEOC testing guidelines, which extend far beyond paper and pencil tests, against the importance of union access to information which is of no discernible benefit to the union or its members. The national labor policy in favor of open and good faith bargaining is hardly impaired by maintaining the privacy and confidentality of the test materials in question. In short, the failure of the Board and Sixth Circuit to evaluate the "good faith" requirement in light of Title

VII's policy to promote an objective selection process, of which "job-related" tests are an integral part, alone requires this Court to reverse the decision of the Sixth Circuit.

CONCLUSION

For the above-stated reasons, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-968

THE DETROIT EDISON COMPANY,
Petitioner.

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AS AMICUS CURIAE

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BRIEF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AS AMICUS CURIAE

CONSENT TO FILING

This Amicus brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The American Psychological Association ("APA"), a non-profit professional organization founded in 1892, is the major association of psychologists in the United States. The purpose of the Association, as set forth in its Bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all its branches in the broadest and most liberal manner."

The Association has 47,000 members and includes the vast majority of psychologists holding doctorate degrees

from accredited universities in the United States. Approximately half of the members have a direct interest in psychological testing — the specific matter at issue in this case. However, because questions of confidentiality, privilege and privacy, as they pertain to the relationship between psychologists and their clients, are central to this case, all members of the Association, all other psychologists, and the clients whom they serve, could be directly and adversely affected by the decision of the National Labor Relations Board ("Board") as enforced by the United States Court of Appeals for the Sixth Circuit.

One of the APA's central functions is to establish ethical standards for the guidance of psychologists. The Association's code of ethics, binding on all members, is enforced by an ethics committee of APA designated specifically for this purpose. The committee, with the concurrence of APA's Board of Directors, has the authority to impose sanctions against members who violate the ethical code, including suspension or expulsion from the Association. Further, the APA's code of ethics has been incorporated in the laws of many states, thus governing the professional conduct of many nonmember psychologists licensed in those states.

APA also has been instrumental in developing testing standards for the validation and administration of psychological aptitude and other tests. The standards enunciated by Amicus have been referenced by the Equal Employment Opportunity Commission, the Office of Federal Contract Compliance, and the Department of Justice in their respective guidelines on nondiscriminatory employee selection procedures.

Amicus has a direct interest in the outcome of this case because the decision of the Court of Appeals, if allowed to stand, undermines several principles of its ethical code pertaining to confidentiality and client relationships as well as important standards relating to test security necessary to assure the validity of psychological testing.

SUPPLEMENTAL STATEMENT OF THE CASE[1]

This matter arises from a decision of the United States Court of Appeals for the Sixth Circuit enforcing an order of the National Labor Relations Board requiring Detroit Edison ("Company") to provide to the Utility Workers Union of America ("Union") employees' raw test scores and test papers from psychological aptitude tests without their consent, and copies of the actual test battery.

Detroit Edison has, for many years, used aptitude tests to predict job performance and to select applicants most likely to succeed in specific positions, including the Instrument Man position (A. 75, 178-79). One of the requirements for promotion to the Instrument Man job is a minimum grade of "recommended" on a battery of aptitude tests consisting of two widely used exams, the Minnesota Paper Form Board Test (MPFB)[2] and the Engineering and Physical Science Aptitude Test (EPSAT)[3] (A. 189, P.A. 20a). The tests are administered to the employees by the Company's Industrial Psychology Division, headed by Dr. William L. Roskind, a licensed psychologist in the state of Michigan and a member of the American Psychological Association (A. 74-77).

---

[1]The Supplemental Statement is not a complete statement but rather sets forth those facts germane to the arguments propounded by Amicus.

[2]The Minnesota Paper Form Board Test is a widely employed aptitude test designed to predict the ability to visualize the interrelationship of parts in three-dimensional spaces, a skill shown to be important to perform the Instrument Man position (A. 193-95).

[3]The six-part Engineering and Physical Science Aptitude Test is used to examine aptitudes in the areas of mathematics and physical sciences (A. 198-99). EPSAT has been used for over thirty years to predict success in jobs relating to the physical sciences such as the Instrument Man position (A. 198, 204-05).

The test battery for the Instrument Man position has been validated on three separate occasions, twice by Detroit Edison and a third time, in 1972, by an independent testing organization (A. 190, 238, 343-67). All three studies showed a very high correlation between successful performance on the test battery and in the Instrument Man position, a fact uncontested by the Union (A. 190, 206, 239, 367). The validation studies also verified the appropriate cut off to predict successful performance in the Instrument Man position (P.A. 64a).

Employees are given the test battery by professional psychologists who assure them, before they take the test, that their actual test scores will be kept in confidence and that the only information that will be released is an interpretation of overall performance (A. 85, 445). To guard the confidentiality of this information, management is not given actual numerical scores, only a general evaluation of the applicants' performances on the test battery (A. 77, 83, 91, 127). Further, the test data are kept in a locked file to which only the Company's professional psychologists have access (A. 83).

Confidentiality of scores is maintained to prevent their misuse and to protect employees from damaging harassment and ridicule (A. 83-84). In fact, prior to the Company's institution of measures to safeguard test scores, several employees suffered ridicule at the hands of their peer employees because of indiscrete disclosure of low scores and terminated their employment with the Company (A. 84).

The Company's psychologists restricted access to the test battery and the actual test papers (A. 83) in order to ensure the validity of the tests (A. 77-78). The reliability of the selection process would be destroyed if copies of the test questions were disseminated to future applicants for promotion to the jobs for which the battery had been fully validated (A. 77-78).

In late 1971, Detroit Edison's professional psychologists administered the above-described test battery to employees seeking promotion to the Instrument Man position. When ten employees who took the battery were rejected for promotion for failure to obtain a "recommended" on the battery (P.A. 20a-21a), the Union filed a grievance against the Company. The central issue in the arbitration and NLRB proceedings which followed concerned what testing data the Company would make available to the Union. During the course of the proceedings, the Company and its professional psychologists furnished all of the following information to the Union:

(1) A written explanation of the test battery (A. 127-31).

(2) Representative samples of the kinds of questions that appear on both the Minnesota Paper Form Board and the EPSAT Tests (A. 125, 280).

(3) The Company's 1970 revalidation report (A. 343-53).

(4) The 1972 validation report conducted by the outside consultant, the National Compliance Company (A. 354-78).

(5) The raw test scores of all applicants, without employee identification (A. 279-80).

In further attempts to accommodate the Union's demands, the Company made the following proffers of information, each of which was refused by the Union:

(1) The Union demanded copies of each applicant's raw test score and test paper (A. 164). The Company offered to supply the raw test scores and test paper of any employee who consented (A. 7). However, the Union flatly refused to seek such consents (A. 44).

(2) The Union insisted that the Company provide it with copies of the actual test battery. The Company, having provided all the requested validation studies, a written explanation of the test battery, and sample questions, offered to permit the Union representative to take the test battery

(A. 6). The Union refused to accept this offer. The Company also offered to disclose the test battery and other requested testing materials to a qualified psychologist of the Union's choosing (A. 6). The Union also rejected this offer even though the test battery would have been useless to a lay person without the assistance of such a psychologist (A. 27, 50-51, 71-72, 79).

Although the Company's attempts at accommodation were rejected by the Union, the Board, in a two-to-one decision, ordered the Company to give the Union the raw test scores and actual test papers of the employees, without their permission, and the test battery (P.A. 16a). The only ostensible protection provided to safeguard the information was to order the Union not to copy the tests or to disclose them to past or future examinees (P.A. 16a). The dissenting Board member, who would have required the Company to divulge the test batteries only to a qualified psychologist of the Union's choosing, noted the futility of the Board's ineffectual restriction (P.A. 17a). Moreover, the Board's purported safeguards, limited as they were, did not cover the confidential test scores of the employees (P.A. 16a).

When the Company declined to comply with the Board's order, the Board sought enforcement by the Court of Appeals. The court, in a two-to-one decision, enforced the Board's order forcing disclosure of all the testing data demanded by the Union, including the confidential test scores of the employees, and the validated test battery (P.A. 7a-8a).

Judge Weick, dissenting, acknowledged the need to accommodate the competing interests at issue (P.A. 12a). Recognizing the confidential and privileged relationship between the administering psychologists and the examinees, he held that:

> "The disclosure of the test papers, as well as the individual scores, would subject the psychologists to the sanctions of disciplinary action which could result in their suspension or even revocation of their licenses by the state of Michigan" (P.A. 9a).

He further noted that the test battery was "in the custody of qualified psychologists" and that "disclosure of such papers would violate the Code of Ethics of the American Psychological Association which has been recognized by the statutes of the state of Michigan, Mich. Stat. Ann. §§ 14.677(1)(b)" (P.A. 8a, 9a).

In addition, Judge Weick pointed out the futility of the Board's proposal to protect the test materials from improper dissemination, labeling them as "really naive" (P.A. 11a) and concluded that the Board's order constituted a gross abuse of discretion because it recognized only the interests of the Union and failed to consider any of the other conflicting interests involved (P.A. 12a).

SUMMARY OF ARGUMENT

The Court of Appeals has enforced an order of the National Labor Relations Board which, if not reversed, will require the disclosure to a union by professional psychologists of raw test scores and actual test papers of examinees without their consent, and of a validated test battery. The order constitutes an intrusion into the confidential relationship between the psychologist and the client, a relationship which is recognized in the over 35 states which accord it a testimonial privilege.[4] Disclosure of the raw test scores and actual test papers by the professional psychologist also contravenes the ethical principles of Amicus, principles which have been incorporated in the licensing laws of most of the states in the country.[5]

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[4] *See* note 12, *infra*.

[5] *See* note 31, *infra*.

These principles give paramount importance to the protection of clients' welfare, including the maintenance of the confidentiality of potentially embarrassing information such as test scores.

Disclosure of the raw test scores and actual test papers to union representatives, who have no professional obligation to safeguard their confidentiality or to refrain from misusing them, also constitutes an invasion of the examinees' rights of privacy.

Finally, the order of the court below requiring that a validated test battery be given to the Union conflicts with the mandate of Title VII, 42 U.S.C. §§ 2000e, *et seq.*, and other fair employment practice laws and regulations which require that methods of employee selection and promotion be nondiscriminatory. Pursuant to guidelines issued by three federal agencies charged with responsibility to insure nondiscriminatory employment practices,[6] only tests which have been validated according to standards developed by the APA may be used in employee selection and promotion. Disclosure of such tests to persons with no professional obligation to protect their security will destroy the tests' validity.

ARGUMENT

I. FUNDAMENTAL INTERESTS OF EMPLOYEES AND PSYCHOLOGISTS ARE IGNORED BY UNLIMITED DISCLOSURE TO THE UNION OF PSYCHOLOGICAL TEST SCORES AND TEST PAPERS LINKED WITH THE NAMES OF THOSE TESTED

In ordering Detroit Edison to provide the Union with the actual test scores and test papers of individual examinees, the NLRB and the Court of Appeals have respected only the

[6] *See* note 40, *infra*.

asserted interests of the Union,[7] and have ignored important interests of the tested employees and the psychologists.[8] Detroit Edison attempted to accommodate all competing interests by providing to the Union the test scores of all the examinees, without matching the scores with their names, information unavailable to Company management. The Company did offer to match test scores with the identities of those examinees who consented; however, the Union refused to seek such consents.

A. Disclosure of Employee-Linked Psychological Scores and Test Papers Ignores the Employee's Interest in a Confidential Relationship with the Psychologist

Confidentiality is crucial to fostering the degree of openness between the psychologist and tested employees necessary to the provision of professional psychological services.[9] The Detroit Edison employees consented to take the

[7] *See Kroger Co.* v. *NLRB*, 399 F.2d 455, 457 (6th Cir. 1968), where the court recognized that "the critical issue appears to be how to recognize and how adequately to protect each of the conflicting interests that are involved here."

[8] The NLRB has asserted that no employee has raised any objection to the disclosure of his test scores. However, neither has any employee *consented* to disclosure. Moreover, no employee is a party to this action. The administering psychologists have a duty imposed by their code of ethics and state licensing laws to maintain the confidentiality of test results unless the client consents to disclosure.

[9] The Court of Appeals dispensed summarily with the claim of confidentiality and privilege by analogizing to a case which held that a promise made by a company that it would not disclose economic data gathered from neighboring companies was not a valid defense to a union's request for information. *General Electric Co. v. NLRB*, 466 F.2d 1177, 1185 (6th Cir. 1972). The confidentiality required to foster a fruitful relationship between psychologists and their clients and to protect the clients' privacy rights is quite different from a corporation's interest in preservation of economic data.

psychological aptitude tests with specific assurances that their test scores and responses would be held in strictest confidence.[10] The effective operation of psychological tests requires that individuals be placed in an atmosphere in which they can display candor and honesty. Whether in a testing or therapeutic situation, a psychologist's clients may be called upon to reveal personal thoughts, experiences, and memories. The psychologist's clients would refrain from making such revelations without the assurance that their communications would be held in confidence.

To ignore the confidential relationship between the examinee and the psychologist would have a substantial chilling effect on prospective test takers. If those who agree to be tested face disclosure of their responses, many will choose test answers they feel will not subject them to embarrassment or harassment, thereby destroying the accuracy of the examination and the psychologist-client relationship. Others will refrain entirely from participating in the tests, even if it means foregoing the opportunity of employment or advancement.

These considerations underlie the many state licensing laws that assure confidentiality in the psychologist-client relationship.[11] These states have thereby recognized the injury to the professional relationship and to the individual client that can result from disclosure of psychological test scores. Legislatures in a large majority of states also have

[10]Even had these assurances not been given, the employees could justifiably rely on their relationship with the psychologist to protect their test scores from disclosure. The fact that the psychologist was retained by the employer does not alter the client-psychologist relationship. *See Tweith v. Duluth, M & I Ry. Co.*, 66 F. Supp. 427 (D. Minn. 1946).

[11]*See* footnote 31, *infra*.

recognized the need for confidentiality by granting a testimonial privilege to client communications with a psychologist.[12]

Amicus does not urge that this Court must find a privileged relationship in this case. Rather, APA submits that the interests of the psychologist and employee should

[12]The following states have recognized a psychologist-client privilege: Ala. Code tit. 34, § 26-2 (1975); Alaska Stat. § 08.86.200 (1977); Ariz. Rev. Stat. Ann. § 32-2085 (1976); Ark. Stat. Ann. § 72-1516 (1957); Cal. Bus. & Prof. Code § 2918 (Deering 1975) and Cal. Evid. Code §§ 1010-1028 (Deering 1966 & Supp. 1978); Colo. Rev. Stat. § 13-90-107(g) (1973); Conn. Gen. Stat. § 52-146c (1977); Del. Code Ann. tit. 24, §3518 (1974); D.C. Code Ann. §§ 2-496, 14-307 (1973); Fla. Stat. Ann. § 490.32 (Aupp. 1978) (released July 1, 1978), § 90.503 (Special pamphlet 1978) (effective July 1, 1978); Ga. Code Ann. § 84-3118 (1975); Idaho Code § 54-2314 (Supp. 1977); Act of Aug. 15, 1963, 1963 Ill. Laws 2912, § 6, *reprinted in* Ill. Ann. Stat. ch. 91-½, § 406 (Smith-Hurd 1966); Ind. Code Ann. § 25-33-1-17 (Burnes 1974); Kan. Stat. § 74-53-23 (1972); Ky. Rev. Stat. § 319.111 (1978); La. Rev. Stat. Ann. § 2366 (West 1974); Me. Rev. Stat. tit. 14 R. Evid. 503 (Supp. 1975); Md. Cts. & Jud. Proc. Code Ann. § 9-109 (1974 & Supp. 1977); Mass. Ann. Laws ch. 233, § 20B (Michie/Law. Co-op. 1974 & Supp. 1978); Mich. Comp. Laws Ann. § 338.1018 (1976); Minn. Stat. § 595.02(7) (1976); Miss. Code Ann. § 73-31-29 (1972); Mo. Rev. Stat. § 337.055 (Supp. 1978); Mont. Rev. Codes Ann. § 66-3212 (Supp. 1977); Neb. Rev. Stat. § 27-504 (1975); Nev. Rev. Stat. §§ 49.215-49.245, 49.290 (1977); N.H. Rev. Stat. Ann. § 330-A:19 (1966); N.J. Stat. Ann. § 45:14B-28 (West 1978); N.M. Stat. Ann. § 67-30-17 (1974); N.Y. Civ. Prac. Law § 4507 (McKinney 1963 & Supp. 1977); N.C. Gen. Stat. § 8-53.3 (1969); N.D. Cen. Code R. Evid. 503 (Supp. 1977); Ohio Rev. Code Ann. §§ 4732.17(d), 4732.19 (Page 1977), 2717.02 (Page 1953 & Supp. 1978); Okla. Stat. tit. 59, § 1372 (1971); Or. Rev. Stat. § 44.040(h) (1977); Pa. Stat. Ann. tit. 63, § 1213 (Purdon Supp. 1977); S.D. Compiled Laws Ann. § 19-2-3.1 (Supp. 1977); Tenn. Code. Ann. § 63-1117 (1976); Utah Code Ann. § 58-25-8 (Supp. 1977); Va. Code § 8.01-399 (1977); Wash. Rev. Code § 18.83.110 (1976); Wyo. Stat. § 33-27-103 (1977).

be given appropriate consideration and not totally subordinated to the asserted interests of the Union.[13]

B. Recognition of the Confidentiality of the Employee's Test Scores and Test Papers Protects the Employee's Privacy.

Confidentiality is also essential to protect the client's privacy.[14] Tested employees now face the prospect that their psychological and intelligence test scores and their personal responses may become common knowledge of the Union and their peers. Disclosure of the test scores to persons unqualified to interpret them and possibly hostile to the very concept of testing subjects the tested employees to the risk of damaging harassment and embarrassment.[15] A

[13]The court ordered disclosure without any demonstration of need by the Union. Presumably, the Union hoped that the matched test scores would somehow be useful in its grievance with Detroit Edison, but the mere assertion that information is necessary does not require an employer to supply the information in the exact form requested. *See National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

[14]*See* Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence*, 64 GEO. L.J. 613, 647-57 (1976), which recognizes that a psychologist-client privilege is essentially a corollary of a right to privacy.

[15]Unlike the psychologist, the Union is under no professional or ethical duty to safeguard against the improper dissemination of the test scores and papers. Indeed, the Union has an incentive to encourage dissemination. The Company's use of psychological testing as a criterion for job placement thwarts the attainment of the Union's goal of seniority as the sole criterion for job advancement. It is therefore in the Union's self-interest to create disrespect for the tests. One method to accomplish this aim would be to publish the scores of "top-notch" employees who fared poorly on the tests or to ridicule the test answers of those who did well, in the guise of showing that the test is not a valid predictor of job success. The Union has not demonstrated any interest in, or appreciation for, the nature and severity of the effect of disclosure on the employees involved.

severe societal stigma attaches to any suggestion of mental deficiency.[16] Even those tests that do not, in fact, measure mental deficiency are often perceived as such by the uninformed when such tests are administered by a psychologist.

In the context of psychological testing, the employees' right to privacy must, at a minimum, include the freedom to choose the circumstances under which their intelligence scores, aptitudes and opinions are to be divulged.[17] This Court has acknowledged that the individual's right of privacy protects against disclosure of personal data.[18] In *Whalen v. Roe*, 429 U.S. 589 (1977), this Court upheld the constitutionality of a

[16]The court in *Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973), recognized the danger to the individual of the dissemination of school-administered psychological test results. The court found that publication of such test scores could result in "scapegoating in which a child might be marked out by his peers for unpleasant treatment . . . ." *Id.* at 915.

[17]It has been said that:

> "The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others. The right to privacy is, therefore, a positive claim to a status of personal dignity — a claim for freedom, if you will, but freedom of a very special kind."

Reubhausen & Brim, *Privacy and Behavioral Research*, 65 COL. L. REV. 1184, 1189-90 (1965).

[18] "The cases sometimes characterized as protecting privacy have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."

Whalen v. Roe, supra, 429 U.S. at 589-600 (notes omitted).

New York law which required the state to keep records of the names and addresses of all individuals obtaining certain drugs by prescription. The state law strictly prohibited disclosure of the patients' names. The Court recognized the privacy interests of the plaintiffs and the potentially embarrassing and harmful effect of disclosure, but found that the statutory scheme "evidence(s) a proper concern with, and protection of, the individual's interest in privacy," *id.* at 605, since access to the confidential information was rigidly safeguarded, *id.* at 601-02.[19]

No such safeguards or concern for the rights of the individual are evident in the Court of Appeals' approach to the present case. To the contrary, the Union has successfully rejected all offers by the Company which would safeguard the data from indiscriminate use.[20]

Congress, the courts, numerous states, and the psychologists' code of ethics all recognize that the disclosure of personal information akin to that involved here can invade the individual's privacy. The individual's

[19]Justice Brennan, concurring, summarized the Court's opinion as follows:

> "The Court recognizes that an individual's interest in avoiding disclosure of personal matters is an aspect of the right of privacy, *ante*, at 598-600, and nn. 24-25, but holds that in this case, any such interest has not been seriously enough invaded by the State . . . .
>
> "In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure."

429 U.S. at 606-07.

[20]The Court of Appeals adopted the Board's restrictions on the use of the actual test battery. Amicus asserts that this restriction is no more than an ineffective admonition. But even this insignificant protection was not afforded to the employees' test scores or answer sheets.

right to personal privacy has been protected either by assuring confidentiality or providing very limited and protected disclosure.

Thus, in the Professional Standard Review Law, 42 U.S.C. §§ 1320c, *et seq.* (Supp. V 1975), Congress accommodated the government's need for access to information concerning the cost and use of Medicare and Medicaid aid with the individual's rights of privacy by requiring the coding of the patient's name so as to "provide maximum confidentiality as to the patient's identity . . . ." 42 U.S.C. § 1320c-4(a)(4). To assure compliance, Congress attached criminal penalties for the unauthorized disclosure of the data. 42 U.S.C. § 1320c-15. A three-judge district court, in upholding the statute's constitutionality, reiterated that "maximum confidentiality is to be maintained concerning the information furnished by the physicians to the Professional Standards Review Organizations." *Association of American Phys. & Sur. v. Weinberger*, 395 F. Supp. 125, 136-37 (N.D. Ill.), *aff'd*, 423 U.S. 975 (1975).

Similarly, the Freedom of Information Act permitting public access to a wide range of government reports and information, exempts from disclosure those requests seeking "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The Court of Appeals for the District of Columbia explained that the exemption is "designed to protect individuals from public disclosure of intimate details of their lives, whether the disclosure be of personnel files, medical files, or other similar files." *Rural Housing Alliance v. United States Dept. of Agr.*, 498 F.2d 73, 77 (D.C. Cir. 1974) (note omitted). In another FOIA suit, *Department of the Air Force v. Rose*, 425 U.S. 352 (1976), this Court held that disclosure of material contained in personnel and medical files that

would otherwise "constitute a clearly unwarranted invasion of privacy" would be permissible only if the names and identifying characteristics of the subjects were deleted.

Even in the absence of congressional mandate, courts have attempted to accommodate the individual's need for privacy in personal information with competing interests.[21] In *Lora v. Bd. of Ed. of City of New York*, 74 F.R.D. 565 (E.D.N.Y. 1977), the court accommodated the interests of students in the privacy of psychological diagnostic files with those of a litigant asserting a class action civil rights claim on the students' behalf. The plaintiff sought production of randomly selected, *anonymous* diagnostic and referral files. In determining whether to permit even this limited disclosure, a disclosure similar to that voluntarily made by Detroit Edison, the court asked the following four questions:

> "First, is the identification of the individuals required for effective use of the data? Second, is the invasion of privacy and risk of psychological harm being limited to the narrowest possible extent? Third, will the data be supplied only to qualified personnel under strict controls over confidentiality? Fourth, is the data necessary or simply desirable?"

Id. at 579.[22]

[21] *See Merriken v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973), which held that a school-administered psychological personality test, seeking answers to personal and intimate questions, violated the students' right to privacy. The test invaded the privacy of the students because they were given no real choice but to take the test and because the students' responses were not safeguarded. In the instant case, although the examinees did consent to taking the tests, failure to safeguard the examinees' scores and responses would in itself invade their privacy — particularly in view of the assurance they were given that their scores would be held in confidence.

[22] The court in *Lora* recognized that "[m]ost persons protest not the mere disclosure of private embarrassing or damaging information, but rather the concomitant disclosure of identifying data." 74 F.R.D. at 580. However, the court noted that even the elimination of all identifying data, "while undoubtedly reducing the degree of invasion of privacy attendant upon dissemination, does not necessarily, then, reduce that invasion to zero." *Id.* at 582.

In the instant case, neither the Board nor the Court of Appeals addressed these important questions. Amicus submits that the answers to these questions would preclude production of the test scores and papers. The Union, dissatisfied with the information provided in anonymous form, made no showing that the correlation of the names of the examinees with their scores was useful. The Court of Appeals ordered unbridled disclosure of the materials to Union personnel who are not qualified to interpret them without any consideration of whether the disclosure would invade the examinees' privacy or result in a risk of psychological harm.

C. Requiring the Psychologist to Disclose A Client's Test Scores and Test Papers Breaches the Confidential Relationship Established with the Client and Violates the Psychologist's Code of Ethics.

Not only did the NLRB and the Court of Appeals ignore the interest of the tested employees, but they also disregarded the professional responsibilities of the psychologist. Disclosure of the test scores and papers to the Union requires that psychologists breach the confidential relationships established with their clients. Denying confidentiality of the relationship has the potential to destroy not only the trust the examinees placed in the psychologist, but also public trust in psychologists generally. The court's decision may well force psychologists to refrain entirely from

keeping records in order to preserve their clients' privacy and the integrity of the relationship,[23] resulting in inferior service to their clients.

Moreover, the court's order is in direct conflict with the psychologists' ethical standards[24] and state licensing laws,[25] including Michigan's,[26] which incorporate those standards. The *Ethical Standards of Psychologists* promulgated by the American Psychological Association were designed expressly to assure confidentiality and protect the privacy of those served by psychologists.[27] The denial of these interests would, in the words of Principle 3 of the *Ethical Standards*, "reduce the trust in psychologists held by the general public." Only if the integrity of these standards is respected by the courts can they continue to serve as guidelines to the practicing psychologist and a force for ethical treatment of the public. The Court of Appeals' order profoundly discourages the enforcement of ethical standards for psychologists.

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[23] *See* Slovenko, R., *Psychotherapy, Confidentiality, and Privileged Communication*, 116 (1966):

> "[T]he best protection that can be ensured to the patient is the exercise of extreme caution in writing records. . . . Incomplete clinical records, of course, are not scientifically desirable, but the therapist is in the unfortunate position of having to choose between keeping incomplete records or no records at all, or, on the other hand, of subjecting his patient to the possibility of having his most intimate confidences revealed. . . ."

[24] American Pschological Association, *Ethical Standards of Psychologists* (1977 Revision).

[25] *See* note 31, *infra*.

[26] Mich. Stat. Ann. § 14.677(1)(b) (Cum. Supp. 1975).

[27] During the period 1970 through 1976, APA's committee on ethics took punitive action, ranging from censure to expulsion, against seven psychologists for violation of the code's requirement that client communications be kept strictly confidential.

The Ethical Standards place upon the psychologist a "primary obligation" to safeguard "information about an individual that has been obtained . . . in the course of . . . teaching, practice or investigation . . . ." Preamble to Principle 5. The court's decision to order disclosure of the matched test scores to the Union directly contravenes this confidentiality standard. The order totally ignores the psychologist's efforts to assure "the dignity and worth of the individual and honor the preservation and protection of fundamental human rights." Preamble to *Ethical Standards of Psychologists*.

Further, the *Ethical Standards* specifically safeguard the individual's test scores by directing that psychologists "strive to insure that the test results and their interpretation are not misused by others." Principle 8c. According to the *Standards for Educational and Psychological Tests*, a companion document to the *Ethical Standards of Psychologists*, "[t]est scores should ordinarily be reported only to people who are qualified to interpret them."[28] Neither the Union nor its members are qualified to interpret or use the scores properly. The Union's refusal to place the scores in the hands of a psychologist qualified to interpret them suggests to Amicus that the Union may in-

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[28] American Psychological Association, *Standards for Educational and Psychological Tests*, J2. The comment to Standard J2 recognizes that "curious peers should not have access" to test scores. While Amicus does not contend that the Union itself is a curious peer, its members would be considered such. Moreover, the Union has an incentive to publicize these scores. *See* note 15, *supra*. Further, the comment does not, as asssrted by the NLRB in its brief opposing the petition for a writ of certiorari, leave open the question "whether untrained people should be given test scores." Rather, the unanswered question involves whether untrained persons who must make a decision to admit or hire based on the tests should be given training necessary for the interpretation of scores or the interpretation. The Union was given the interpretation of the test scores; the training of a Union employee has never been an issue in this case.

deed intend to use the scores in a manner harmful to those tested. "Psychologists know that they bear a heavy social responsibility because their recommendations and professional actions may alter the lives of others." Principle 1e. Untrained Union officials may not appreciate the potential effect the improper use of test results may have on others.

The ethical standards make every effort to protect the privacy rights and integrity of the relationship not only by safeguarding dissemination of personal information to outsiders but also by regulating the psychologist's own use of the data. The psychologist may discuss a client's case only for professional purposes with persons having a particular concern with the case. Principle 5b. Written and oral reports must be made with "every effort . . . to avoid undue invasion of privacy," Principle 5b, and "clinical and other materials [may] be used in classroom teaching and writing only when the identity of the persons involved is adequately disguised." Principle 5c. The psychologist must also provide "for the maintenance of confidentiality in the retention and ultimate disposition of confidential records." Principle 5f.[29]

Finally, the court's order directly contravenes the psychologist's responsibility to inform the client of the limits of confidentiality. Principle 5d.[30] The decision of the

[29]To assure confidentiality, Dr. Roskind, Detroit Edison's psychologist, maintains the records in a locked file cabinet in his office. No one, other than professional psychologists, has access to the scores (A.83).

[30]The NLRB asserts in its brief opposing the petition for a writ of certiorari that "it is highly speculative that the Code of Ethics would in fact be breached by the Board's order" as the APA's contentions are based on violation of the court's restrictions by the Union. While the Board and the Court did place restrictions on the Union's use of the test battery itself, neither the Board nor the Court of Appeals restricted the Union's use of the test scores and papers.

Court of Appeals requires the psychologist to violate this principle and to repudiate the assurances of confidentiality given to the employees prior to their taking the tests.

If the Court of Appeals' decision is not reversed, psychologists will be forced to give a disclaimer of confidentiality when testing clients. Such a disclaimer could result in employees foregoing the opportunity of job advancement in fear that their test papers and scores will become the subject of public knowledge and comment. Those who take the test will do so without the candor necessary for valid testing.

Requiring Detroit Edison psychologists to breach professional confidences places them in a crossfire of conflicting demands. The Court of Appeals demands disclosure while the psychologists' professional ethics and obligations require confidentiality. The Union has asserted no justification to compel such a result.

The *Ethical Standards* of the APA govern not only the conduct of APA's members but also that of many nonmember psychologists since over thirty states, including Michigan, require compliance with the APA *Ethical Standards* by licensed psychologists.[31] Psychologists who violate

[31]*See* Ala. Code tit. 34, § 26-3 (1975); Ark. Stat. Ann. § 72-1517 (1957); Conn. Gen. Stat. § 20-186 (1977); Del. Code Ann. tit. 24, § 3513(a)(8) (1974); D.C. Code Ann. § 2-491(e) (1973); Ga. Code Ann. § 84-3105 (1975); Idaho Code § 54-2305(b)(1) (Supp. 1977); Ill. Ann. Stat. ch. 91-½, § 415(7) (1966 & Supp. 1978); Ind. Code Ann. § 25-33-1-3(h) (1974 & Supp. 1977); Iowa Code Ann. § 147.76 (Supp. 1977); Kan. Stat. § 74-5308(a) (1972); Ky. Rev. Stat. § 319.081 (1978); Me. Rev. Stat. tit. 32, §§ 3816, 3837 (1977); Md. Ann. Code, art. 43, § 627 (1971); Mass. Ann. Laws ch. 112, § 119(d) (Michie/Law. Co-op. 1975); Mich. Comp. Laws Ann. § 338.1001(b) (1976); Minn. Stat. § 148.98 (1976); Miss. Code Ann. § 73-31-21(a)(1) (1972); Mont. Rev. Codes Ann. § 66-3209(1)(d) (Supp. 1977); Neb. Rev. Stat. § 71-3807 (1976); N.J. Stat. Ann. § 45:14B-24(e) (West 1978); N.C. Gen. Stat. § 90-270.15(a)(4) (1975 & Supp. 1977); N.D. Cen. Code § 43-32-27(7) (Supp. 1977); Okla. Stat. tit. 59, § 1361 (1971); Or. Rev. Stat. § 675.110(10) (1977); S.C.

the standards are subject to suspension or revocation of their licenses.[32] Disclosure of test scores and papers violating the official standards could subject the psychologist to such discipline.[33]

The failure of the Board and the Court of Appeals to consider the interests of the employees and the psychologists must be corrected. "The material which the company did furnish to the union was . . . sufficient to permit the union to process adequately the grievance pending before the Arbitrator, or to perform its duties under the collective bargaining agreement." (P.A. 11a) (Judge Weick, dissenting).

Moreover, the court's and Board's total rejection of the interests of the psychologist and the employee was not limited to the context of industrial psychological aptitude testing for employment promotions. The court has placed the interests of psychologists and tested employees in a totally subservient position to the naked claim of the Union for information. It is evident that any disclosure of con-

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Code § 40-56-60 (1976); S. D. Codified Laws Ann. §§ 36-27-27, 36-27-38(6) (1977); Tenn. Code Ann. §§ 63-1118, 63-1119 (1976); Tex. Rev. Civ. Stat. Ann. art. 4512C(8)(a) (Vernon 1976); Utah Code Ann. § 358-25-11(10) (1974 & Supp. 1977); W. Va. Code § 30-21-6-(a)(3) (1976). *See also* the following states which have patterned their codes of ethics after the APA *Ethical Standards:* Colo. Rev. Stat. § 12-43-104(3)(a) (1973); Haw. Rev. Stat. 465-6(4) (1967); Mo. Rev. Stat. § 337.035(1)(4) (Supp. 1978); N.M. Stat. Ann. §67-30-5(B)(1) (1974); Pa. Stat. Ann. tit. 63, § 1205(2) (Supp. 1977); Wis. Stat. Ann. § 455.08 (1974).

[32]*See* Mich. Stat. Ann. § 14.677(10)(6) (Cum. Supp. 1975).

[33]Amicus does not assert that the State of Michigan or the APA would discipline Dr. Roskind, Detroit Edison's industrial psychologist, for disclosing the test scores or papers pursuant to the court's order. However, the fact that Michigan and the APA would not place Dr. Roskind in such an untenable position in no way justifies the fact that the court's order does violence to the ethical standards and the licensing laws of Michigan.

fidential and private communications between an industrial psychologist and his clients could be ordered based upon such a precedent. By refusing to recognize any confidential relationship between the industrial psychologist and the tested employee, the court has threatened every aspect of the confidentiality of that relationship — whether involving psychological testing or counseling at a school, in an institution, at work, or in private psychotherapy.

II. DISCLOSURE TO THE UNION OF PSYCHOLOGICAL APTITUDE TESTS WILL DESTROY THE VALIDITY OF THE TESTS AND RESULT IN VOIDING OBJECTIVE AND NONDISCRIMINATORY EMPLOYEE SELECTION PROCEDURES

The decision of the Court of Appeals, requiring a professional psychologist to provide directly to the Union a standardized, validated test battery, poses a substantial threat to the continued use of objective, nondiscriminatory employee selection devices, such as validated psychological aptitude tests. The Court of Appeals' decision is directly at odds with the nondiscriminatory employee selection procedures mandated by Title VII, 42 U.S.C. §§ 2000e, *et seq.*, Executive Order 11246, and the guidelines issued pursuant thereto by federal agencies charged with enforcement of equal employment laws and orders.

The use of psychological aptitude tests for employment purposes has become widespread in the United States both in the private and public sectors. Its usefulness as an aid toward objective and nondiscriminatory selection of employees has been demonstrated in several surveys,[34] in-

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[34]*See, e.g.*, Personnel Policies Forum in September, 1976 (PPF Survey #114, p. 1 (BNA, 1976)).

cluding a study conducted by the United States Civil Service Commission.[35]

With the increasingly widespread use of such tests, APA has adopted guidelines to insure the validity and fairness of those tests. Thus, the *Ethical Standards of Psychologists* promulgated by the Amicus and binding on all APA members, as well as on many nonmembers through incorporation in state licensing laws,[36] establishes standards for test administration, including procedures for test security.[37]

Further, APA, in conjunction with the American Educational Research Association and the National Council on Measurement in Education, has developed *Standards for Educational and Psychological Tests.*[38] The *Standards* have been developed to aid in assuring reliability and validity of testing by the psychological profession and in part to assure that psychological testing conforms with the requirement of Title VII and other fair employment practice laws that employee testing be nondiscriminatory. The *Standards* set forth with specificity the measures that must must be taken to provide evidence of testing reliability and validity. *See Standards* at 25-55. In order to protect test validity, the *Standards* require that "the test user share

[35]Status of Test Usage in FY 77, Test Services Section, Personnel Research and Development Center, United States Civil Service Commission (Dec. 1977).

[36]*See* statutes cited at note 31, *supra.*

[37]Principle 8 states in pertinent part that "test users avoid imparting unnecessary information which would compromise test security, but they provide requested information that explains the basis for decisions that may adversely affect that person . . . ." American Psychological Association, *Ethical Standards of Psychologists 6 (1977* Rev.).

[38]American Psychological Association, *Standards for Educational and Psychological Tests* (1974).

with the test developer or distributor a responsibility for maintaining test security." *Standards* at 67.[39] In the accompanying comment the rationale for test security is made clear:

> "In many cases, however, prior knowledge of test items or scoring procedures could destroy validity . . . security may be compromised where examinees have had much prior experience with a public test, have been taught specific test items or have heard a lot about the test."

Standards at 67.

The Court of Appeals, in enforcing the Board's order requiring full disclosure of the test battery to the Union, failed to consider either the interests of employers, or of professional psychologists in maintaining test security. As a result, professional psychologists are placed in the position of being required under court order to violate the *Ethical Standards* of the American Psychological Association which have been incorporated in the licensing laws of numerous states, including Michigan, as well as the *Standards for Educational and Psychological Tests*, by making available to the Union a test battery which it does not have the necessary skills or knowledge to use. Both the Board and the Court of Appeals arbitrarily refused to consider the logical alternative: to provide the test battery to a qualified psychologist of the Union's choosing for review.

If this Court does not reverse the order below, the test battery which has been validated on three separate occasions will be distributed to persons without responsibility to secure the tests. The likely consequence of disclosure to

[39]*See also* American Psychological Association, *Principles for the Validation and Use of Personnel Selection Procedures*, published by the Division of Industrial-Organizational Psychologists (1975). These principles similarly require that the psychologist or other test user be responsible for maintaining test securitty. *Id.* at 15.

lay persons, particularly to those who may in the future take the test battery, may well be to destroy the validity of the battery which necessarily depends on the naivete of the test taker.

Since the passage of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.*, a major objective in the use of psychological tests for employee selection has been to ensure that such tests are nondiscriminatory. By requiring disclosure of a validated test battery to a union representative, the Board and the Court of Appeals totally ignored the requirements of Title VII and the guidelines which have been issued by various enforcing agencies to ensure objectivity and nondiscrimination in employee selection procedures.

In guidelines issued by three of the agencies responsible for overseeing compliance with Title VII and related executive orders, the requirements of test validity and security have been recognized and the standards developed by the Amicus specifically incorporated.[40] The guidelines require that tests be validated pursuant to standards consistent with generally accpeted professional standards such as those developed by the APA in the *Standards for Educational and Psychological Tests.*[41]

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[40]*See, e.g.*, 29 C.F.R. § 1607.5(a) (Equal Employment Opportunity Commission); 28 C.F.R. § 50.14 (Department of Justice); 41 C.F.R. § 60-3.5 (Office of Federal Contract Compliance).

[41]*Id.* Further, the four federal government agencies charged with enforcement of fair employment practice laws, EEOC, Civil Service Commission, Department of Justice, and Department of Labor, recently proposed Uniform Guidelines on Employee Selection Procedures. 42 FED. REG. 65,542 (December 30, 1977). The proposed guidelines require test users to demonstrate validity of the tests, consistent with generally accepted professional standards "such as those described in the Standards for Educational and Psychological Tests," 42 FED. REG. § 5C, at 65,544, and provide for test security, 42 FED. REG. § 12, at 65,546.

On at least three separate occasions, this Court has recognized the importance of test validation to the enforcement of Title VII and similar laws. In the first case in which this Court considered this issue, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that the guidelines of the EEOC on testing were entitled to great deference, 401 U.S. at 433-34, and that tests were to be sanctioned only when they provided a "reasonable measure of job performance." 401 U.S. at 436. The Court's mandate in *Griggs v. Duke Power* can be met only if tests are validated; the irresponsible disclosure ordered by the Board and the Court of Appeals would make validation impossible.

In a second case, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court reemphasized the deference to be given to EEOC's testing guidelines. The Court specifically noted that "these guidelines draw upon and make reference to professional standards of test validation established by the American Psychological Association." 405 U.S. at 431. Further, the Court made clear that tests used for selection and promotion of employees were to be judged by whether they comported with the guidelines for validation set forth by the Amicus. *See also Washington v. Davis*, 426 U.S. 229, 247 & n.13, 251 & n.17 (1976); *Kirkland v. New York St. Dept. of Correctional Serv.*, 520 F.2d 420, 426 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976).

The Court of Appeals for the Second Circuit, when faced with an issue similar to that addressed by the Board and the Court of Appeals in this case, recognized the importance of test security and the prejudice to future test takers if tests were disseminated to future examinees. In *Kirkland v. New York St. Dept. of Correctional Serv., supra*, 520 F.2d 420, a race discrimination case, the Second Circuit overturned that part of a district court's order requiring the defendant to make available for plaintiffs' review a new promotion

test. 520 F.2d 427, 431. The Court of Appeals in *Kirkland* recognized that tests, to be sanctioned as objective and nondiscriminatory, must be validated in accordance with EEOC guidelines and specifically addressed and upheld the need for test security:

> "The District Court ordered that the new test prepared by defendants be submitted to the plaintiffs for review. We find this requirement difficult to comprehend. Presumably, this examination will be taken by members of the plaintiff class in competition with others. Permitting advance review by plaintiffs would place all others at a competitive disadvantage. If the District Judge is seeking professional assistance from plaintiff's expert, his order should so provide; and proper steps should be taken to insure confidentiality."

520 F.2d at 427.

Unlike the Board and the Court of Appeals in this case, the court in *Kirkland* reached an equitable balance by holding that if tests are to be provided to adverse parties, they should be disclosed only through the agency of an expert professional psychologist. As this Court and the Sixth Circuit have recognized, the National Labor Relations Board should seek to acknowledge and accommodate all legitimate interests involved in a proceeding before it. *See, e.g., National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149, 153-54 (1956); *Kroger Co. v. NLRB*, 399 F.2d 455, 457 (6th Cir. 1968).

Even before passage of Title VII, the General Counsel of the Board refused to find a violation of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, by an employer for refusing to disclose copies of psychological test questions to a union. In that case, as here, the company had explained to the Board that advance inspection would allow the content of the test to be widely disseminated "and thus impair

the usefulness of the test." NLRB G. C. Adm. Rul. No. SR-657, 46 L.R.R.M. 1387, 1388 (1960). *See also* NLRB G. C. Adm. Rul. No. SR-477, 46 L.R.R.M. 1252 (1960).

Detroit Edison has offered to provide the test battery, which is in the possession of psychologists professionally obligated to guard its security, to a qualified psychologist of the Union's choosing. Clearly this would accommodate the interests of the Company, the Union, professional psychologists, and future examinees. At the same time, it would balance the mandate of the National Labor Relations Board to insure informed collective bargaining with the equally significant mandate of Title VII and the professional standards of psychologists to insure objective and nondiscriminatory employee selection procedures. *See, e.g., National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Kroger Co. v. NLRB*, 399 F.2d 455, 457 (6th Cir. 1968).

CONCLUSION

Amicus American Psychological Association respectfully submits that for the above stated reasons this Court should reverse the decision of the United States Court of Appeals.

Respectfully submitted,

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OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF OF AMERICAN SOCIETY OF PERSONNEL ADMINISTRATION AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-968

DETROIT EDISON COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

BRIEF OF AMERICAN SOCIETY OF PERSONNEL ADMINISTRATION AND INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION AS AMICI CURIAE

CONSENT TO FILING

This Amici brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties. Letters to that effect have been filed with the Clerk of this Court.

INTEREST OF THE *AMICI CURIAE*

The American Society for Personnel Administration and the International Personnel Management Association join together as *Amici Curiae* for this case.

The American Society for Personnel Administration (ASPA) is the world's largest association of personnel and industrial relations executives, representing nearly 23,000 professionals in business, government, and education dedicated to the furtherance of personnel and

industrial relations management. Accordingly, ASPA and its members have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

The International Personnel Management Association (IPMA) is an organization representing 1,000 member agencies including civil service commissions, merit system boards and personnel departments at the federal, state and local levels of government. The Association, which was established in 1973 by the consolidation of the Public Personnel Association (founded in 1906) and the Society for Personnel Administration (founded in 1937), also represents over 4,000 individual members, primarily personnel professionals and personnel administrators in the public sector. IPMA attempts to foster and develop interest in sound personnel administration by providing a focus and forum for personnel professionals throughout the United States and abroad.

While the case at bar is more directly relevant to the private sector, the public and private sectors share common interests in the area of personnel administration. It is for this reason that IPMA joins ASPA in filing this brief as *Amici Curiae*.

The *Amici* are particularly concerned that the enforcement and interpretation of laws and regulations governing employment be mutually compatible, and that the diverse agencies of government charged with the regulation of the workplace be cognizant of the need to enforce the laws entrusted to them in a rational and consistent manner. The *Amici* believe that this case presents a classic case of regulatory "tunnel vision," in which the NLRB chose to fashion a remedy for an alleged violation of the NLRA—the statute which it enforces—in a manner which would create significant barriers to compliance with another statute which it does not enforce: Title VII of the Civil Rights Act of 1964, as amended. Further, the cavalier treatment given by the court below to the serious effort of the psychological profession to effect a responsible code of practice, prompted in large part by the development of Title VII law, is cause for great concern.

The *Amici* are particularly concerned with maintaining public confidence in selection procedures. Job-related, valid examinations are often the basis for selecting the best qualified personnel in both private industry and in government merit systems. The release of test materials, as ordered by the court below, would shake public confidence in the fairest system for making employment decisions yet devised.

Amici ASPA and IPMA believe that this case provides the proper vehicle for the Supreme Court to articulate an appropriate balance between two major laws which impact heavily on the workplace. Further, this case calls for this Court to reiterate its admonition to the separate, specialized regulatory agencies that they avoid addressing cases before them in a vacuum, and act "with a discriminating awareness of the consequences of [their] action." *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 174 (1962).

SUMMARY OF ARGUMENT

The past fifteen years have witnessed an explosion of laws, regulations, Executive Orders and ordinances at all levels of government, State and Federal, designed to regulate every facet of the employment relationship. In addition to earlier laws designed to provide a framework for peaceful industrial relations, and setting

forth minimum standards for wages and hours, complex regulatory schemes have been devised to insure that the workplace is free from discrimination, to insure that it is free from hazards to the safety and health of employees, and to insure that the various pension and welfare programs which workers have come to expect are prudently managed and financially secure. To all this have been added decisions of courts and quasi-judicial adjudicatory bodies interpreting, analyzing, and expounding upon the impact of each of these laws on the workplace.

Too often, this multifarious regulation of the workplace has imposed competing or conflicting requirements on employers. Little or no effort has been made by the executive and legislative branches to construct a coherent policy, weaving together all these requirements so that employers can understand their legal requirements and structure employment policies, practices and procedures accordingly. It has fallen to this Court to formulate rules to harmonize these competing requirements, and to solve what Mr. Justice Harlan characterized as "a problem of line drawing." *Volkswagenwerk* v. *Federal Maritime Commission,* 390 U.S. 261, 284 (1968) (Harlan J. concurring).

The need for such "line drawing" is particularly strong in this case. The NLRB and the court below held that the refusal of the petitioner, an employer, to disclose to its union employment tests, answer sheets, and the scores of individuals, constituted a failure to bargain in good faith. Yet for the employer to comply with this requirement would cripple its ability to fill vacancies with the best qualified personnel while complying with the requirements of equal opportunity law!

We believe further that the NLRB and the court below misapplied the obligation to bargain in good faith, and injected themselves into substantive matters of bargaining which the Congress has reserved to the parties.

In the last analysis, this case brings up the most fundamental question of government regulation of the workplace. That issue is whether, consonant with the essential requirements of maintaining harmonious and just industrial relations, and applying fair and nondiscriminatory practices and procedures, an employer may not look to professionally developed employee selection devices to enable it to choose, among the candidates for a job, that person possessing in the most abundant degree the qualities and abilities suited to successful performance. It is the position of the *Amici* that as a matter of fundamental public policy an employer is free to do so, and that the many requirements which statutes and regulations impose upon employers can be, and by this Court should be, harmoniously interpreted to that end.

ARGUMENT

I

THE DISCLOSURE TO THE CURRENT UNION OFFICERS OF THE TESTS, ANSWER SHEETS, RAW UNANALYZED TEST SCORES AND IDENTIFICATION OF TEST TAKERS WILL PREVENT EMPLOYERS FROM USING TESTS OR OTHER OBJECTIVE EMPLOYEE SELECTION DEVICES BY RENDERING VALIDATION OF THE SELECTION PROCEDURES IMPOSSIBLE.

A. The Developing Body of Equal Employment Law Compels Employers to Use Objective Employee Selection Devices. Even Absent the Public Law Imperative, Employers Must Turn to These Objective Selection Devices in Order to Choose the Best Qualified Person for the Increasingly Sophisticated Industrial Tasks in the Economy.

The purpose of the various laws designed to protect equal employment opportunities was succinctly summarized by this Court in the landmark case of *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429 (1971), when it declared the objective of Title VII of the Civil Rights Act of 1964 was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." [1] In addressing this purpose, courts have focused upon the various employment processes to determine whether the process serves invidiously to screen out otherwise qualified persons because of their racial, religious, or ethnic identity or their sex.[2]

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[1] See also Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Contractors Ass'n. of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971); United States v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir. 1977).

[2] Griggs, *supra* (testing); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) (supervisory evaluations); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970) (recruitment); Leisner v. N.Y. Telephone Co., 358 F.Supp. 359 (S.D. N.Y. 1973) (interviewer ratings); Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972) *cert. denied*, 409 U.S. 982 (1972) (pay increases); Baxter v. Savannah Sugar & Refining Corp., 495 F.2d 437 (5th Cir. 1974) *cert. denied*, 419 U.S. 1033 (1974) (promotions).

The effect of this process is to assure that the person charged with the final hiring decision is presented with a choice of applicants selected because of their ability to perform the job and not because of their membership or nonmembership in a racial, religious or ethnic group, or because of their sex. See *Griggs, supra;* see also *City of Los Angeles* v. *Manhart*, 435 U.S. ——, 46 U.S.L.W. 4747 (April 25, 1978), where the Court reiterated Title VII's mandate to focus on the individual rather than on the group.

The efficacy of standardized employment tests has been recognized by the Congress, and by the administrative agencies charged with enforcing the various equal employment laws. Section 703(h) of Title VII, 42 U.S.C. § 2000-2(h), provides that the use of "professionally developed ability tests" is a sanctioned activity as long as the tests are not designed, intended or used to discriminate. The agencies and the courts have gone further, and recognized proper testing as a *preferred* activity. The current EEOC Guidelines state as a matter of policy that "*properly validated* employee selection procedures can *significantly contribute* to the implementation of nondiscriminatory personnel policies, as required by Title VII." 29 C.F.R. § 1607.1(a) (1977) (emphasis added). Proposed new federal inter-agency Guidelines recognize the importance of objective selection devices in the development of a nonbiased personnel program and the need for clear guidance as to an

employer's obligation to conduct a testing program free of discriminatory characteristics. See 42 Fed. Reg. 65542 (Dec. 30, 1977). While it is true that Congress did not outlaw subjective employment practices, *Hester* v. *Southern Railway Company,* 497 F.2d 1374 (5th Cir. 1974), one of the major teachings of the equal employment cases is that the use of objective selection devices is a preferred activity, provided that they are validated as job-related in accordance with accepted professional standards. See *Washington* v. *Davis,* 426 U.S. 229 (1976); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975); *Reed* v. *Arlington Hotel Company,* 476 F.2d 721 (8th Cir. 1973), *cert. denied,* 414 U.S. 854 (1973); *Rowe* v. *General Motors Corp., supra,; United States* v. *Jacksonville Terminal Co.,* 451 F.2d 418 (5th Cir. (1971), *cert. denied,* 406 U.S. 906 (1972).

Supplementing these legal imperatives for employers to operate personnel systems free from discriminatory features is their need to have qualified employees to perform increasingly sophisticated industrial tasks. Indeed, the record shows that the very job in question in the instant case ("Instrument Man") is one in which "fairly frequent opportunity to cause extremely serious operating conditions from misjudgment or erroneous action exists. Instrument Men are often exposed to hazards as well as adverse working conditions." (Appendix, p. 354).

Especially in view of the social and economic significance of safe and efficient operation of power plants, the legitimacy of Detroit Edison's decision to utilize professionally developed and validated employment tests as part of the selection process is beyond question. Indeed, the necessity for all employers to upgrade the quality of their workforce to meet the requirements of

modern society has received judicial recognition. See *Townsend* v. *Nassau County Medical Center,* 558 F.2d 117 (2nd Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978). And the sponsors of Title VII were explicit that "an employer may set his qualifications as high as he likes," and may test to determine those qualifications, as long as the tests are job related. 110 Cong. Rec. 7213; see *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 434 n. 11.

B. In Order to Comply with Federal Regulation of Objective Employee Selection Devices, Employers Must Validate Their Tests in Accord With Professional Validation Standards.

This Court has consistently held that the criteria by which employment tests are to be judged are those promulgated by recognized professional societies. *Albemarle Paper Co.* v. *Moody, supra; Washington* v. *Davis, supra.* Most recently, this Court affirmed without opinion a decision by a three-judge district court that the National Teachers Examination passed constitutional and statutory challenge because it was validated as job-related according to professional standards. *United States* v. *South Carolina,* 54 L. Ed. 2d 775 (1978). The three-judge court there affirmed stated that "[t]o the extent that the EEOC guidelines conflict with well-rounded expert opinion and accepted professional standards, they need not be controlling." *United States* v. *South Carolina, supra.* See *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976)

The enforcement agencies likewise recognize the controlling force of professional standards. They do not themselves prescribe the way in which tests are to be validated, but quite properly make reference to the standards of the American Psychological Association (the APA). Thus, the Guidelines of the Equal Employment Opportunity Commission (EEOC) respecting use

of tests or other selection procedures require that evidence of validity must be based upon "studies employing generally accepted procedures . . . such as those described in the Standards for Educational and Psychological Tests and Manuals" published by the American Psychological Association. 29 C.F.R. § 1607.5 (1977). Similarly, joint regulations promulgated by the Labor Department implementing equal employment requirements for government contractors under E.O. 11246, 41 C.F.R. Part 60-3 (1977), the Justice Department under its varied responsibility for enforcing equal employment laws, 28 C.F.R. § 50.14 (1977), and the Civil Service Commission under its responsibilities with respect to state and federal employment, all describe the APA standards as the "generally accepted professional standards for evaluating standardized tests and other assessment techniques." *E.g.*, 41 C.F.R. § 60-3.5(b) (1977) (Labor Department). And on December 30, 1977, the EEOC, the Departments of Justice and Labor, and the Civil Service Commission published for comment a proposed revised set of joint testing guidelines, 42 Fed. Reg. 65542 (Dec. 30, 1977), which by their own terms are designed to represent "professionally acceptable methods" of the psychological profession for demonstrating job-relatedness of a selection procedure, and which reaffirm the APA standards as "the generally accepted professional standard." 42 Fed. Reg. 65542 at § 5(c) (Dec. 30, 1977).

Under the APA standards, which have been given such controlling force, *test security is a prerequisite to the proper validation of an employee selection device.* Standard I5 of the APA as published provides:

I5. The test user shares with the test developer or distributor a responsibility for maintaining test security.

COMMENT: Test security is a problem whenever a lapse in security can result in changing an individual's score without making a change in his true score. For some kinds of tests a lapse of security would not be serious. If one is to be tested for achieved skill, for example, knowing and practicing the test samples might be highly recommended. In many cases, however, prior knowledge of test items or scoring procedures would destroy validity. The problem is not simply one of cheating. Security may be compromised where examinees have had much prior experience with a popular test, have been taught specific test items, or have heard a lot about the test.

AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL & PSYCHOLOGICAL TESTS 67 (1974) (hereinafter "APA STANDARDS").

Standard J2 of the APA Standards states:

J2. Test scores should ordinarily be reported only to people who are qualified to interpret them. If scores are reported, they should be accompanied by explanations sufficient for the recipient to interpret them correctly.

COMMENT: There are difficult problems associated with the question of who should have access to test scores within an organization. Certainly, curious peers should not have access to them. An individual who must make the ultimate decision to admit or to reject, or to hire or to reject, or to certify or not to certify, must have the interpretation. One useful (and unanswered) question is whether such a person who lacks the training necessary for the interpretation of scores should be given that training or should be given only the interpretations of scores. *Id.* at 68.

Supplementing the APA Standards, the Division of Industrial-Organizational Psychology of the APA (Division 14) has published a set of principles described as the "official statement of the Division concerning procedures for validation research, personnel selection, and promotion."

That Division's Principle C-13 provides:

> The psychologist or other test user is responsble for maintaining test security. This means that all reasonable precautions should be taken to safeguard test materials and that decision makers should beware of basing decisions on scores obtained from insecure tests.

APA Division of Industrial-Organizational Psychology, Principles for Validation and Use of Personnel Selection Procedures (hereinafter "Division 14 Principles") 15 (1975).

Under these judicially recognized professional standards, tests disclosed to laymen in the manner ordered by the NLRB and the court below could not be validated as job-related under the requirements of equal opportunity law. Indeed, the disclosures would prevent an employer from even *attempting* to perform a professionally acceptable validation of the test. As one leading authority in the field has put it:

> An essential precaution in finding the validity of a test is to make certain that the test scores do not themselves influence any individual's criterion status. For example, if a college instructor or a foreman in an industrial plant knows that a particular individual scored very poorly on an aptitude test, such knowledge might influence the grade given to the student or the rating assigned to the worker. Or a high-scoring individual might be given the benefit of the doubt when academic

grades or on-the-job ratings are being prepared. Such influences would obviously raise the correlation between test scores and criterion in a manner that is entirely spurious or artificial.

This possible source of error in test validation is known as criterion contamination, since the criterion ratings become 'contaminated' by the rater's knowledge of the test scores. To prevent the operation of such an error, it is absolutely essential that no person who participates in the assignment of criterion ratings have any knowledge of the subjects' test scores. *For this reason, test scores employed in 'testing the test' must be kept strictly confidential. It is sometimes difficult to convince teachers, employers, military officers, and other line personnel that such a precaution is essential.* In their urgency to utilize all available information for practical decisions, such persons may fail to realize that the test scores must be put aside until the criterion data mature and validity can be checked.

> A. Anastasi, Psychological Testing 106 (3d ed. 1968) (emphasis added).

As noted by the dissenting opinions in both the NLRB and the court below, the controls placed by the NLRB over disclosure of the materials were merely "hortatory," and offered no real security against improper disclosure.[3] Even if the union officials who received the tests did keep them confidential, there is no assurance that the security of the tests would be maintained. The local union is required to conduct an election for all of its officers at least once every three years. 29 U.S.C. § 481(b). Thus, the officers who would receive the materials in confidence may be relieved of their of-

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[3] NLRB v. Detroit Edison Co., 560 F.2d 722, 727 (6th Cir. 1977), *appeal pending*.

ficial union responsibility; and their subsequent use of their knowledge with respect to the tests, either to further their own positions or to the detriment of other employees, would be impossible to police.

C. The Request of the Union for the Tests and Related Documents and the Order of the NLRB and the Sixth Circuit Granting the Union's Request in Full Was Based Upon the Erroneous Concept That Lay Persons Could Make Informed Judgments of the Predictiveness of a Selection Device by Determining Its "Face Validity."

In the present case, the employer, Detroit Edison Company, was requested by the union to turn over to the union a battery of employment tests, and supplementing documents. The employer denied the union's specific request, but, as summarized by the dissent in the court below, it "furnish[ed] to the union a wealth of material, which included: the company's 1970 validation report of the tests; the 1972 National Compliance Company Validation Report; explanations of the batteries of tests given; representative sample questions from the batteries; the test scores of all of the applicants, but without revealing which examinee received the score."[4] The employer made further offers of disclosure, including "the name and test score of any examinee who consented thereto. . . . The company further offered to permit the union's representative, Mr. Clem Lewis, to take the tests. The company further offered to turn over to a qualified psychologist selected and employed by the union, all of the withheld material which the union requested."[5] The union refused the employer's offer, and demanded the full disclosure of all materials.

[4] NLRB v. Detroit Edison Co., *supra* at 727.

[5] *Id.* at 727.

The court below noted that "[i]t is possible that the union will not be able to make any determinations about the fairness of the tests by itself and that it will need the advice of a psychologist,[6] and that "[t]his may be a case where it would have been better if the union and Detroit Edison had been able to agree upon a neutral party to receive the documents. . . ."[7] However, the court stood behind the Board's admittedly broad authority in fashioning remedies, and ordered disclosure.[8]

The request of the union for the actual tests, unanalyzed raw scores of the test takers, answer sheets and related documentation was in fact predicated upon a concept in psychological testing known as "face validity." Face validity is not validity in the professionally accepted definition of the term. Rather, it relates to the appearance of the test to the test taker and to the employer:

> Content validity should not be confused with face validity. The latter is not validity in the technical sense; it refers, not to what the test actually measures, but to what it appears superficially to measure. Face validity pertains to whether the test 'looks valid' to the subjects who take it, the administrative personnel who decide on its use, and other technically untrained observers. Fundamentally, the question of face validity concerns rapport and public relations.

A. ANASTASI, PSYCHOLOGICAL TESTING 104 (3d ed. 1968). As another authority has put it: "A test that seems relevent to the layman is said to have 'face validity.'

[6] NLRB v. Detroit Edison, *supra* at 726.

[7] *Id.* at 727.

[8] *Id.* at 726.

Adopting a test just because it appears reasonable is bad practice; many a 'good-looking' test has failed as a predictor."

CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING 183-4 (3rd ed. 1970).

Indeed, this question of face validity underlies the entire case. The record clearly shows that the sole reason for the union's request for the tests and supporting data was to make a lay determination of the face validity of the test. See App. pp. 27-30, 50-55. Yet the record shows equally clearly that the union was incapable of making any informed determination about the validity of the test. (App. pp. 28-44.) That the rationale underlying the union's request was specious does not end the issue. For in ordering the disclosure in the exact form and content of the union's request the NLRB and the court below destroyed the future usefulness of the tests, prevented their further validation, and subjected the employer to potential serious and costly equal employment liability under Title VII if it does not abandon testing for this sensitive job.

II

EVEN ABSENT TENSION BETWEEN THE NLRA AND TITLE VII, THE COURT OF APPEALS OUGHT TO BE REVERSED, BECAUSE THE DUTY TO BARGAIN IN GOOD FAITH IS NOT VIOLATED WHEN A COMPANY OFFERS TO PROVIDE RELEVANT INFORMATION TO A UNION IN A MANNER OR MEDIUM WHICH PERMITS THE UNION TO FULFILL ITS OBLIGATIONS AS EXCLUSIVE REPRESENTATIVE OF THE EMPLOYEES IN THE BARGAINING UNIT.

The position of *Amici* regarding the application of the National Labor Relations Act (NLRA) to the present case is simple and straightforward: the mere

fact that an employer declines to provide information in the exact manner requested by the union, or through the exact medium requested by the union—although willing to provide it in another manner or through another medium—ought not to be held to violate the employer's duty to bargain in good faith, absent other indicia of employer bad faith. To hold otherwise would be to upset the very sensitive balance between employer and union which is the essence of free collective bargaining and the ideal of freedom of contract.

The factual background of this case shows a continuing series of attempts by the employer to meet the union's needs to represent its members while preserving the viability of the tests. It was against this backdrop of union demand and employer offer that the National Labor Relations Board found that the employer failed to bargain in good faith with the union "by refusing to provide the union with copies of the battery of aptitude tests administered to the employee applicants for the position of Instrument Man B, including the actual test papers of the applicants and the actual test scores made by each employee." [9] Finding the "test of probability of relevance to the duties and responsibilities of the union" [10] to be met, and finding further that the Board did not abuse its "broad discretion" [11] in ordering as a remedy the wholesale production by the employer of its test scores and employee score identification, the court below affirmed the Board.

The court below erroneously assumed that because the information requested by the union was appar-

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[9] Detroit Edison Co., 218 NLRB No. 147.

[10] NLRB v. Detroit Edison, *supra* at 725.

[11] *Id.* at 726.

ently [12] relevant to the performance of its representational obligations, the inquiry regarding the employer's good faith must end. The court below adopted a *per se* rule which had previously been applied only in limited circumstances, which is unsupported by the holdings of its sister Circuits or this Court and which, if allowed to stand, poses a substantial threat to free collective bargaining.

The duty to bargain in good faith [13] applies both to the negotiation of a collective bargaining agreement [14] and to the administration of the agreement once negotiated.[15]

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[12] Only apparently. See the discussion of "face validity," *supra*.

[13] Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees. . . ." Section 8(d), 29 U.S.C. § 158(d), defines collective bargaining as:

> The mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

[14] See, *e.g.*, NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874 (1st Cir. 1941), *cert. denied*, 313 U.S. 595 (1941); NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943) and NLRB v. General Electric, 418 F.2d 736 (2nd Cir. 1969), *cert. denied*, 397 U.S. 965 (1970) *rehearing denied*, 397 U.S. 1059 (1970); NLRB v. Call, Burnup & Sims, Inc., 393 F.2d 412 (1st Cir. 1968). Moreover, an employer is required to bargain in good faith over all subjects of mandatory bargaining. NLRB v. Wooster Division of Borg Warner Corp., 356 U.S. 342 (1958).

[15] NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967).

The requirement of good faith bargaining has as one of its principal purposes the furthering of the objective of freedom of contract: to enhance the ability of the parties to collective bargaining to fashion their own terms and conditions of employment, and to administer the terms of their agreement without substantial external interference.[16] Thus, the duty to bargain in good faith has been described as more than a mere obligation to negotiate, because "[t]he employer [or union] who does not wish to bargain collectively could, under a definition requiring simply negotiation, bargain with what amounts to a fixed determination not to reach agreement. . . ." [17] But the test is not one of objective reasonableness, "a requirement that the parties make 'objectively reasonable proposals' and employ objectively reasonable practices and procedures." [18] Had the courts adopted a standard of objective reasonableness, the judiciary would have been put in the position of setting the terms and conditions of the collective agreement, "a substantial interference by government with freedom of contract." [19] So, for example, in *H. K. Porter*

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[16] Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 1963 LAB. L.J. 1016.

[17] *Id.* at 1022.

[18] Ibid.

[19] *Id.* at 1022. See also NLRB v. American National Ins. Co., 343 U.S. 395 (1952). Rather, the standard of good faith bargaining has evolved from cases such as NLRB v. Reed & Prince Mfg. Co., *supra* at 885, where Judge Magruder spoke of the duty to bargain in good faith as an obligation "to confer and negotiate sincerely with the representatives of [the] employees . . . with an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation." The obligation to negotiate with the view of trying to reach an agreement has been reiterated in numerous cases such as Majure v. NLRB, 198 F.2d 735 (5th Cir. 1952); NLRB v. South-

Co. v. *NLRB*, 397 U.S. 99 (1970), this Court reaffirmed the principle that good faith bargaining does not permit the Board to impose the substantive terms of a collective bargaining agreement either through a finding of bad faith on the part of an employer or through a remedial order addressed to the employer's bad faith. The Court stated that:

> One of [the] fundamental policies [of the NLRA] is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." [20]

The principle of freedom of contract is fostered by requiring the parties to collective bargaining to share information reasonably necessary for informed negotiation.[21] This duty has been described as compelling a finding of a *per se* violation of the Act where there is a failure to provide requested information regarding mandatory subjects of bargaining, such as individual earnings, job rates and classifications, merit increases and pensions, because, in these cases,

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western Porcelain Steel Corp., 317 F.2d 527 (10th Cir. 1963); NLRB v. General Electric Co., *supra* at 736 and United Transportation Union Local 1699 v. NLRB, 546 F.2d 1038 (D.C. Cir. 1976).

[20] H. K. Porter Co. v. NLRB, *supra* at 108.

[21] See, *e.g.*, NLRB v. Acme Industrial Co., *supra*. Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942), and Sinclair Refining Co. v. NLRB, 306 F.2d 569 (5th Cir. 1962).

> [t]here could be no negotiation on the subject, in any sense of the term, until the information was supplied to the union. And since there was no bargaining on a statutory subject the NLRB was not required to review the conduct of the negotiations. Neither the manner in which the negotiations were conducted nor the employer's state of mind was in issue. It was only confusing for the NLRB to treat the issues as problems of good faith. . . ." [22]

In *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956), this Court appeared to find a *per se* violation of the duty to bargain in good faith where an employer refused to provide financial data requested by the union. The Court affirmed a holding of the NLRB that an employer must present some proof for his assertion of poverty when he uses that assertion as a basis to deny a wage increase. As Mr. Justice Frankfurter noted in his separate opinion, the totality of the evidence presented in *Truitt* did not suggest bad faith: "[t]he totality of the conduct of the negotiation was apparently deemed irrelevant to the question; one fact alone disposed of the case." [23] The Court was careful to note, however, that "we do not hold . . . that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts." [24] Thus,

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[22] Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1428 (1958).

[23] NLRB v. Truitt, *supra* at 155. Justice Frankfurter thus urged that the case be remanded for further findings regarding the totality of the employer's conduct.

[24] Truitt, *supra* at 153. It is of interest to note that the Court cites NLRB v. American Nat'l. Ins. Co., *supra*, which held that the Board could not properly find that an employer had bargained in bad faith solely by virtue of his insistence on the inclusion of a broad management functions clause in a collective bargaining agreement.

in *Truitt,* while bargaining about wages certainly could have proceeded without the information requested by the union, the employer put his financial ability forward as a matter of discussion and thus made his economic situation a relevant issue in the negotiations.

It thus appears that where a party to collective bargaining or to a collective agreement has refused the other party's request for information so totally that bargaining or other representational activities—for example, grievance negotiation—regarding statutory subjects cannot proceed, a *per se* violation of § 8(a)(5) has occurred; moreover, a party's refusal to provide information on a subject which he has introduced may be a violation of § 8(a)(5), where the information requested by the other party is relevant to the subject voluntarily introduced by the first party. In both of these instances, free collective bargaining—the freedom of contract ideal—is hampered by the refusal of one side to provide relevant information. But the refusal of one party to provide information requested by the other in the precise form requested by the second party, where the information actually offered permits the requesting party to perform its bargaining or representational obligations, does not hamper free collective bargaining. Further, a Board or court order mandating the precise manner and form of shared information is precisely the sort of intrusion into the collective bargaining process which undermines the statutory objectives of freedom of contract.[25]

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[25] See, for example, NLRB v. American Nat'l. Ins. Co., *supra,* where this Court notes, "Congress provided expressly that the Board should not pass on the desirability of the substantive terms of labor agreements. Whether a contract should contain a clause fixing standards for such matters is an issue for determination across the bargaining table, not by the Board."

In the instant case, the court below was blind to the statutory goal of freedom of contract and adopted a *per se* rule, improperly construing its own decision in *Kroger Co.* v. *NLRB,* 399 F.2d 455 (6th Cir. 1968) and the Ninth Circuit decision in *Emeryville Research Center* v. *NLRB,* 441 F.2d 880 (9th Cir. 1971).

In *Kroger* v. *NLRB, supra,* the court denied enforcement of a Board order which would have compelled the employer to disclose its entire "operating ratio" (O.R.) program to the union. The court found that the O.R. program, even though it was relevant to the union's representation function, "covers many facets of managerial concern which are in nowise related to the union's collective bargaining function."[26] The Court held that the employer had not violated its duty to bargain in good faith for a failure to provide the union with all information which the union viewed as relevant in meeting its obligations as exclusive representative of the employees in the bargaining unit, absent other evidence of employer bad faith. Rather, the Court declared:

> Where the union has sought considerably more information than is required or is relevant to its collective bargaining purposes, and where in fact collective bargaining has been in progress since 1943 with no unresolved grievances or contract disputes, it seems something of a contradiction in terms to find the company guilty of refusing to bargain in good faith by its refusal to disclose the total O.R. program.[27]

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[26] *Kroger, supra* at 457.

[27] *Id.* at 459.

Similarly, in *Emeryville Research Center* v. *NLRB, supra,* the Ninth Circuit rejected a *per se* rule under which the employer would have been found to have failed to bargain in good faith merely because he refused to provide the union with information in the manner requested by the union, where there was no indication of employer bad faith. The Ninth Circuit accepted the finding of the Board that the information requested by the union was relevant to the performance of its duties, but held that "[w]here . . . the Company raises *bona fide* objections to the form in which information is requested and offers to provide information sufficient to meet the Union's need in a mutually satisfactory form, the Union must do more than rely on general avowals of relevance in order to establish its right to the information." [28] The Court in *Emeryville, supra,* distinguished a number of cases cited by the NLRB for support of a *per se* rule. After careful analysis of the applicable caselaw the *Emeryville* court noted that "none of the cases cited by the Board holds that a union has a *per se* right to information in the precise form demanded".[29]

In the case at bar, the court below dismissed *Kroger* and *Emeryville* on the grounds that in those cases the unions' requests were not specific and the showing of need was very general.[30] But the court below ignored the fact that in both *Kroger* and *Emeryville,* it was found that the unions' information requests were relevant. It was the employer's *response* to those requests which was at issue, just as it is in this case. And in those

[28] *Emeryville, supra* at 885.

[29] *Id.* at p. 887, emphasis the Court's.

[30] NLRB v. Detroit Edison, *supra* at 725.

cases, as here, the employers had *bona fide* reasons for not wishing to provide the information requested in the manner requested: in *Kroger* because it would entail disclosing non-relevant data, and in *Emeryville* because of the cost involved in compiling the data in the form requested by the union and because of the chances of improper disclosure. In *Emeryville,* the employer merely offered to discuss the union's request so as to find a mutually satisfactory form for supplying the information. In the instant case, Detroit Edison offered to supply the information in a form and manner actually more usable than that requested by the union. As the Court in *Emeryville* declared: "[W]e do not think there would be the slightest basis for an unfair labor practice charge where the Company offers information in a form different from that demanded but which nonetheless meets every need stated by the union." [31]

In the instant case, the court below even questioned the relevancy of the union's demands, but rested its decision to enforce the NLRB's order on its understanding of the Board's wide discretion to fashion NLRB remedies. However, the Court misunderstood the nature of this case: the question is not whether the NLRB abused its discretion in ordering the remedy it did, but rather whether the Board abused its discretion in finding employer bad faith in the first instance. The court itself recognized the generosity of Detroit Edison's offer, and admitted that the employer's proposed means of disclosure might be of greater use to the union than direct disclosure. To require more of the employer under the guise of good faith bargaining is to make of the good faith requirement something not intended by the Congress.

[31] Emeryville, *supra* at 884.

Even were the court below correct in addressing the issue as one of remedy, the court below incorrectly perceived the Board's Order. By amending the initial Order of the Administrative Law Judge, the Board imposed a remedy unnecessary to the effectuation of the Act and threatening to the Act's underlying freedom of contract purpose. Just as this Court in *H. K. Porter Co.* v. *NLRB, supra,* found that "it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands," [32] the court below improperly upheld Board discretion in determining the precise manner in which relevant informaton was to be shared by the parties when one of the parties had *bona fide* reasons for objecting to the manner of sharing and the other party would not be injured in the performance of its statutory duties by an alternate manner of sharing.

Professor Cox has summarized well the temptation to which the Court fell prey and the danger implicit in accepting such a course:

> The duty to bargain—to meet and treat—was imposed in the hope that negotiations would lead to the kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement. It is a natural step forward to regulate the character of the negotiations so as to increase the probability of rational discussion—but it is also a step carrying many implications.[33]

[32] H. K. Porter v. NLRB, *supra* at 109.

[33] Cox, *supra* at 1433.

By ordering the Company to provide the union with copies of its tests, answer sheets, and scores of identified individuals, the Court has attempted "to regulate the character of the negotiation" between the Company and the union and, by so doing, has vastly increased the bargaining power of the union without providing the union with any more information that it rationally needs to represent the interests of the bargaining unit. The risks of disclosure to the employer are so great, and the limitations on the union's ability to disclose so tenuous,[34] that the bargaining positions of the parties are subject to dramatic alteration.

III.

THE IMPACT OF THIS DECISON ON PUBLIC EMPLOYERS

The membership of *Amicus* ASPA is drawn from personnel professionals in both the private and the public sectors. *Amicus* IPMA represents agencies and individuals in the public employment sector only. Both *Amici* urge the Court to bear in mind, in its consideration of this case, the special impact its decision may have on public employment—even though public employment is not subject to the NLRA.

Since 1972, public employers at all levels have been covered by Title VII and are subject to the full range of equal employment requirements—including the requirement that employee selection procedures be job-related and validated in accordance with the professional standards of the American Psychological Association. *United States* v. *City of Chicago,* 549 F.2d 415 (7th Cir. 1977) *cert. denied* —— U.S. ——; see *Wash-*

[34] See, Note *"Psychological Aptitude Tests and the Duty to Supply Information*: NLRB v. Detroit Edison Co., 91 HARV. L. REV. 869, 875-876 (1978).

ington v. *Davis, supra.* Further, public employers are subject to a host of equal employment obligations emanating from the plethora of federal grant programs.[35] The penalties for violation of the equal employment provisions of these grant programs can include loss of federal funds as well as remedial relief to the alleged discriminatee. *United States* v. *City of Chicago, supra.* Public employers rely heavily on the use of objective selection devices in their employment processes because of the numbers of applicants, the strict merit requirements of state civil service laws, and the requirements of federal statute. See 42 U.S.C. § 4701 *et seq.*

The costs of developing tests and conducting the necessary validation studies by public employers are not inconsequential. It has been estimated that the cost to public employers of complying with the validation requirements of the Federal Executive Agency Guidelines would run into several millions of dollars. The City of Hartford, Connecticut, estimates an average cost of $2 million to develop and validate its selection procedures.[36]

While public employers thus have an obvious interest in preserving their ability to use validated employee selection tests, they have an equal interest in the labor relations implications of the decision below. By 1974,

[35] See, *e.g.*, Revenue Sharing Act of 1972, 31 U.S.C. § 1221. The statute, 31 U.S.C. § 1242 establishes the non-discrimination requirements. Department of the Treasury's implementing regulations adopt the current EEOC testing guidelines for recipient governments. 31 C.F.R. § 51.53(b) (1977).

[36] Report of the Comptroller General, ***Problems with Federal Equal Employment Opportunity Guidelines on Employee Selection Procedures Need to be Resolved,*** FPCD-77-54 (Feb. 2, 1978).

there were bargaining units in over 11,000 state and local government units, covering a total of 4,736,000 employees or 49.8% of full-time state and local employees.[37] In fact, the public sector has witnessed the most significant growth in union organizing in the past decade. While the specifics of public sector labor relations laws vary with each jurisdiction, the private sector model is being adopted by a growing number of public jurisdictions.[38] Thus, for example, the duty of the employer to bargain in good faith is now generally considered to be a basic requirement of the public sector labor relations scheme. The state courts or administrative adjudicatory bodies look to federal precedent in deciding their own statutory issues. As noted by the Supreme Court of Connecticut: "The language [of the Connecticut statutes] is essentially the same and for this reason the judicial interpretation frequently accorded the federal act is of great assistance and persuasive force in the interpretation of our own acts." *West Hartford Education Association* v. *DeCourcy,* 295 A.2d 526, 534 (1972).[39]

Thus the precedent set by this Court in interpreting the good faith bargaining obligation of the National Labor Relations Act will have significant impact upon public employers and upon their ability to use professionally validated employee selection procedures. Indeed, because of the significant cost of developing new tests and the potential enormous liability public em-

[37] U.S. Department of Commerce, U.S. Department of Labor: ***Labor-Management Relations in State and Local Governments, 1976*** (April 1978).

[38] See Kilberg, *Appropriate Subjects for Bargaining in Local Government Labor Relations,* 30 MD. L. REV. 179 (1970).

[39] See also West Irondequoit Teachers Association v. Helsby, 315 N.E. 2d 775 (N.Y. 1974); PLRB v. State College Area School District, 337 A.2d 262 (Pa. 1975).

ployers face from the various equal employment laws and requirements they are subject to, the impact on public employers could be even greater than on private employers were the decision below affirmed.

CONCLUSION

Affirmance of the decision below could gravely hobble the ability of conscientious employers to put the right person in the right job. Tests validated according to professionally accepted standards are the preferred method of accomplishing this purpose. Yet, confronted with the prospect that test data must be disclosed to their unions, employers cognizant of their Title VII obligations, caught between the competing requirements of Title VII and the NLRA, will be forced as a practical matter to end their search for objective, color-blind, sex-blind, merit-based personnel systems. Such a lack of balance between national policies affecting labor relations was precisely what this Court warned against in *Emporium Capwell* v. *W.A.C.O.*, 420 U.S. 50 (1975). See *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), *cert. dismissed.*

In addition, in view of the important national objective of free collective bargaining as expressed in the ideal of freedom of contract, the basic principles of the good faith obligations of the parties to collective bargaining should be restated in light of the increasingly sophisticated forces at work in the economy. Without such a restatement, the freedom of collective bargaining may well be eroded by the rote application of legal concepts.

The decision below should be reversed.

Respectfully submitted,

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